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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-475

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,

Petitioners

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No. 75-

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,

Petitioners

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, the Sac and Fox Tribe of Indians of Oklahoma, the Sac and Fox Tribe of the Mississippi in Iowa, the Sac and Fox Tribe of Missouri, and individual members of the tribes as representatives of all members (hereinafter "petitioners"), respectfully pray that a writ of certiorari issue to review the decisions of the United States Court of Claims entered in this cause on April 25, 1975 and June 27, 1975.

OPINIONS BELOW

The two decisions of the Court of Claims as to which petitioners seek a writ of certiorari appear at pages 1 and 2 of the separate printed appendix ("App.") filed with this

petition. Three earlier opinions in this cause by the Court of Claims and the Indian Claims Commission are also included in the Appendix as follows: (a) *The Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *The United States,* 32 Ind. Cl. Comm. 256 (1973) (App. 3-18); (b) *The Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *The United States,* 196 Ct. Cl. 548 (1971) (App. 19-27); and (c) *The Sac and Fox Tribe of Indians, et al.* v. *The United States,* 20 Ind. Cl. Comm. 439 (1969) (App. 28-88). The directly related case of *The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.* v. *The United States,* 22 Ind. Cl. Comm. 385 (1970) also is included in the Appendix (App. 91-120).

JURISDICTION

Petitioners seek review of the Court of Claims' decisions entered on April 25, 1975 and on June 27, 1975, when petitioners' motion for rehearing *en banc* was denied. This petition was filed within 90 days of such denial. The Court's jurisdiction to grant a writ of certiorari in this cause is based upon 25 U.S.C. § 70s (App. 138-139) and 28 U.S.C. § 1255.

QUESTIONS PRESENTED

Partly as indemnity for a war for which it was not responsible and because of other events beyond its control, the Sac and Fox Nation was compelled in the 1830's to cede to the United States some of the most valuable agricultural lands and lead resources in the world for only a fraction of what the lands were then worth. Petitioners are the successors to the Sac and Fox Nation. They seek in this action under the remedial Indian Claims Commission Act to recover, as damages from the United States, the difference between the fair value of the lands at the valuation

dates, 1833, 1837, and 1838, and the substantially lower amounts that the United States paid for them under coercive treaties.

At the time of the 1962 trial of the value of the eastern Iowa lands, an unbroken line of precedents of the Court of Claims held that private sales of unimproved lands occurring after the valuation dates constituted evidence of the fair value of those lands at the taking dates. In reliance on these precedents, petitioners offered, as the best evidence of the fair value of the cession lands, evidence of a multitude of private sales of the eastern Iowa lands which took place between late 1838 and 1849 and which established unimproved land values averaging between $2.50 and $3.00 per acre.

In its opinion rendered in 1969 the Commission rejected this evidence on the theory that at the valuation dates a hypothetical purchaser (the Commission's approach to the valuation of the lands) would not have known the prices that the lands soon brought in the private market.

On a later remand from the Court of Claims, the Commission again refused to consider the post-cession private sale transactions as proof of value. The Commission twice denied petitioners' motions on remand to offer evidence of private sale transactions in comparable lands occurring at or prior to the cession dates, notwithstanding its holding that such proof was lacking from the record and that it considered such proof as the best evidence of value.

The Sac and Fox petitioners have therefore never had a hearing on the best evidence of the value of their lands, whether that best evidence be the post-cession private sale transactions in those lands or private sale transactions in comparable lands at or prior to the cession dates. The four decisions below of the Court of Claims and the Commission do not contain any reference to the previous uniform precedents of the Court of Claims as to the probative

weight of post-cession private land sales on which petitioners relied in structuring the theory of their case at trial. Nor do the four opinions cite or consider the holdings in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933) and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) which squarely establish petitioners' comprehensive post-cession sales evidence as the best evidence of value, or alternatively, petitioners' undeniable right to submit additional evidence of value to comply with the change in the law created by the Commission's rejection of the governing Court of Claims' precedents.

In summary form, the two questions presented by this petition are as follows:

I.

Whether, in violation of the remedial intent of the Indian Claims Commission Act (the "Act") to resolve ancient Indian claims, and in violation of the rule in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933), petitioners have been deprived of the right to fair market value for their eastern Iowa lands by the adoption of an erroneous valuation standard which relies upon purely hypothetical criteria rather than the best historical evidence of the real value of petitioners' lands?

II.

Whether, in violation of the rule of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), petitioners have been deprived of a hearing on the fair market value for their eastern Iowa lands by being denied the right to submit additional evidence of value in conformity with a new rule of law that was retroactively applied to petitioners' case after trial?

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

The treaties and statutes involved in this cause are printed in the Appendix to this petition as follows: (a) the Sac and Fox Treaty of September 21, 1832 (7 Stat. 374) (App. 121-126); (b) the Sac and Fox Treaty of September 28, 1836 (7 Stat. 520) (App. 127-131); (c) the Sac and Fox Treaty of October 21, 1837 (7 Stat. 540) (App. 132-135); (d) Section 70a of the Indian Claims Commission Act (25 U.S.C. § 70a) (App. 136-137); and (e) Section 70s of the Indian Claims Commission Act (25 U.S.C. § 70s) (App. 138-139). The constitutional provision involved in this matter is the Fifth Amendment to the United States Constitution in pertinent part as follows:

United States Constitution, Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF CASE

The Historical Events

Petitioners are the successors to the once formidable and respected Sac and Fox Nation. At its zenith, the Nation was the dominant Indian tribe in the Mississippi Valley between roughly St. Louis on the south and the Wisconsin River on the north. During the Revolutionary War, the Sac and Fox was the only significant western Indian tribe friendly to the United States. At that time, and for a number of years thereafter, the Nation's capital, known as Saukenuk, was located near present Rock Island, Illinois. When the Revolutionary War ended, the Sac and Fox Nation was politically well-organized, prosperous and healthy for an Indian tribe. Commencing with the turn of the century, however, the Sac and Fox began to fare rather badly and unluckily in their dealings with the United States.

In November, 1804, five Sac and Fox Indians were induced to sign a treaty with the United States ceding all of the Sac and Fox lands east of the Mississippi River, including the capital city of Saukenuk, and some lands in Missouri in the vicinity of St. Louis, for the token sum of $1,000 per year. The Sac and Fox leadership immediately and continuously protested to the United States that the five Indians had no authority to make the treaty, but to no purpose. The United States insisted, although not without the misgivings and doubts expressed by some of its representatives, that the treaty was the binding obligation of the Sac and Fox Nation.

By diplomacy and strategy and some plain stubbornness, the Sac and Fox were able to occupy the ceded lands for another twenty-four years. In 1828, Illinois insisted that they must go and the Nation's capital was moved west of the Mississippi River to a location on the Iowa River. One group, Black Hawk's band, comprising about one-sixth of the Nation's population, mutinied and refused to leave Illi-

nois. A series of confrontations between the band and representatives of the United States and the State of Illinois led finally in 1832 to the inglorious episode known as the Black Hawk War and the defeat and destruction of the band.

The lands owned by the Sac and Fox Nation in Iowa bordering on the Mississippi River were some of the most valuable in the United States; they possessed in abundance all of the qualities sought by settlers and they contained lead ores mined by the Sac and Fox that were thought to be some of the most valuable in the world. Prior to 1832, the Sac and Fox rejected frequent overtures of the United States for the sale of these lands.

The Sac and Fox Nation had no responsibility for the Black Hawk War and the Commission has twice so found. See, e.g., *The Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *The United States,* 5 Ind. Cl. Comm. 367, 435 (1957). But this was not the official viewpoint in 1832. The United States insisted that the Sac and Fox cede the rich eastern Iowa lands and the lead resources partly as indemnity for the Black Hawk War, and a treaty (7 Stat. 374) so providing was signed on September 21, 1832. (App. 121-126) By a treaty (7 Stat. 520) concluded on September 28, 1836, the Nation ceded its interest in a small area along the Iowa River where the Nation's capital had relocated eight years earlier. (App. 127-131) A third cession was made the following year by a treaty dated October 21, 1837 (7 Stat. 540). (App. 132-135) These three treaties effectively ceded all of the Nation's interest in approximately 5.6 million acres of eastern Iowa.[1]

The three purchases were looked upon by contemporary officials as splendid bargains. In transmitting the executed Treaty of September 28, 1836, to the Commissioner of Indian Affairs, United States Commissioner H. B. Dodge,

[1] The ceded areas will sometimes be referred to as the "eastern Iowa lands."

who negotiated the purchase of the Sac and Fox lands along the Iowa River for 75¢ per acre, wrote that the lands had a value of at least $3.00 per acre. (Petitioners' trial exhibit A-7)

After 1832, it was all decline for the Sac and Fox Nation. The last of the national territory in central Iowa was ceded in 1842. Kansas territory was the next stop and that small reservation was ceded in 1859 and 1867. The sale of the last reservation area in Oklahoma was completed in 1891.

And there matters stood for the Sac and Fox Nation until the Congress in 1946 enacted the Indian Claims Commission Act. (25 U.S.C. § 70a, et seq.)

Indian Claims Commission Act

Prior to 1946, the Congress had on occasion passed special legislation permitting a particular tribe to seek redress for wrongs allegedly committed by the United States. The experience with this special legislation was generally unsatisfactory. An obvious deficiency was that only a small number of Indian tribes were afforded the opportunity to have their claims of wrongdoing against the United States heard.

Commencing about 1930, numerous proposals were put before Congress for the enactment of general legislation. By adoption of the Act in 1946, Congress intended to provide a forum in which all claims and demands of Indian tribes against the United States could be heard and determined and put to rest for all time. Congress and the Court of Claims have recognized that "the Act creating the Indian Claims Commission was 'primarily designed to right a continuing wrong to our Indian citizens . . .' [citing H. Rep. No. 1466, 79th Cong., 2d Sess., U.S. Code Cong. Serv. p. 1347 (1946)]" *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians* v. *United States,* 178 Ct. Cl. 570, 582, 372 F.2d 951, 957 (1967). To that end, the Act authorizes suit against the United States for every

conceivable legal and equitable claim and in addition provides that the Commission may hear and determine claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. (25 U.S.C. § 70a (5); App. 136) The Commission's jurisdiction specifically extends to "claims which would result if the treaties • • • between the claimant and the United States were revised on the ground of • • • unconscionable consideration • • •." (25 U.S.C. § 70a (3); App. 136)

Trial of Sac and Fox Claims

In 1951, timely petitions were filed by the Sac and Fox Nation asserting claims and seeking the recovery of damages under the Act with respect to the eastern Iowa lands. The Commission determined that the petitioners had formerly owned 5,584,433.5 acres of the three tracts, and that certain offsets would be allowed the United States out of any awards allowed petitioners. These determinations are final. By mid-1962 the remaining principal issue was whether petitioners had sustained damages by the failure of the United States to pay fair value for the eastern Iowa lands.

At the 1962 trial of this issue before the Commission, petitioners, in reliance upon an unbroken line of decisions of the Court of Claims,[1] presented evidence of private sale transactions in the eastern Iowa lands occurring shortly

[1] *Alcea Band of Tillamooks, et al.* v. *United States,* 115 Ct Cl. 463, 87 F.Supp. 938 (1950), reversed as to interest, 341 U.S. 48 (1951); *Rogue River Tribe of Indians, et al.* v. *United States,* 116 Ct. Cl. 454, 89 F.Supp. 798 (1950), cert. denied, 341 U.S. 902 (1951); *Osage Nation of Indians* v. *United States,* 119 Ct. Cl. 592, 97 F.Supp. 381 (1951), cert. denied, 342 U.S. 896 (1951); *Miami Tribe of Oklahoma, et al.* v. *United States,* 146 Ct. Cl. 421, 175 F.Supp. 926 (1959). This line of cases was strongly reaffirmed in *Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *United States,* 167 Ct. Cl. 710, 340 F.2d 368 (1964). Further discussion of these governing precedents, which have never been disapproved by the Court of Claims, appears at pp. 21-23, *infra.*

after the cession dates as primary proof of the value of these lands at the valuation dates, 1833, 1837, and 1838. The depth and breadth of this private sale evidence was unprecedented in the annals of cases previously presented to the Commission. Modern data processing techniques were applied to raw data consisting of 176 deed books and original entry records in nineteen eastern Iowa counties involving 70,000 pages and 19,000 deeds, and covering *all* public and private land sales between 1838 (the date of first public land sale) and 1849.[1]

In this period, over one million acres of the eastern Iowa lands were sold in private transactions at an average price of $3.28 per acre.

TOTAL PRIVATE SALES FOR EASTERN IOWA CESSIONS[2]

Year	Acreage	Per Acre Average	Average Per Acre 15% Reduction	Average Per Acre 20% Reduction
1839	55,378	$3.37	$2.87	$2.70
1840	74,061	3.16	2.67	2.53
1841	76,978	2.98	2.53	2.38
1842	80,942	3.23	2.75	2.58
1843	73,405	3.18	2.70	2.54
1844	79,907	3.64	3.09	2.91
1845	92,166	3.48	2.96	2.78
1846	95,366	3.48	2.96	2.78
1839-1849 ..	1,040,081	3.28	2.79	2.62

[1] Reference to "public sales" is to the initial disposition made by the government in Iowa of tracts within the cession lands at the uniform governmentally dictated price of $1.25 per acre. "Private sales," however, were sales made between two private parties after such cession lands had been purchased at public sale.

[2] The source is petitioners' trial exhibits Q3.1 through Q3.19 and U3 (pp. 156-157) in petitioners' central Iowa case (see pp. 11, 14, *infra* and App. 91-120). The reduction of average resale prices by 15% and 20% is one of several accepted methods of eliminating improvement values.

The Commission held that the prices paid in these transactions would not have been known at the respective 1833, 1837 and 1838 valuation dates and therefore could not be assumed to be known to the hypothetical purchaser (which was the Commission's approach to valuation) of the eastern Iowa lands.

Instead, the Commission turned to the prevailing government sale price of $1.25 per acre for public lands as a starting point from which the Commission in general worked backwards in arriving at the following values for the eastern Iowa lands:

Year	Acreage	Value per Acre
1833	4,484,000	$ .90
1837	108,800	1.25
1838	990,833.5	1.10

That the rejection by the Commission of the private sales data as proof of the value of the eastern Iowa lands was immensely costly to the Sac and Fox is not a matter of conjecture. The very same private sale data was received in evidence and relied upon by the Commission in its valuation of lands ceded by the Sac and Fox Nation in central Iowa as of 1843. In its central Iowa decision, the Commission stated, "We feel that actual resale data in comparable areas at the same or comparable times are of such probative value that we can give little weight to an appraisal [provided by the government's witness] which ignores such data." (22 Ind. Cl. Comm. at 386; App. 92). The Commission found that the 8,592,000 acres owned by the Sac and Fox Nation in central Iowa were somewhat less desirable than the Sac and Fox eastern Iowa lands and had a value of $1.40 per acre in 1843. (22 Ind. Cl. Comm. at 390; App. 95)[1]

[1] Indeed, even opportunity for a brief glimpse of the actual private sales considerations paid for eastern Iowa land had a marked en-

Prior to the Commission's 1969 decision on the value of eastern Iowa, petitioners had no reason to foresee that the Commission would disregard and depart from an unbroken line of precedents of the Court of Claims[2] which required that post-cession private sales be accorded probative weight. Why the Commission did so is not known. No mention is made of these precedents in the Commission's 1969 decision or in its subsequent decision and orders in this case.

Following the Commission's 1969 valuation decision below, petitioners filed an extensive motion for rehearing with the Commission, again directing its attention to the precedents of the Court of Claims that the post-cession private sales data constituted probative proof (indeed the best evidence) of the value of the eastern Iowa lands and that it was error for the Commission to reject this evidence from its consideration. The motion was denied without comment or discussion by the Commission's order entered more than six months later, on February 11, 1970. (22 Ind. Cl. Comm. at 439; App. 89-90)

First Appeal to Court of Claims

Thereafter followed petitioners' first appeal to the Court of Claims which resulted in remandment to the Commission

lightening effect on the Commission's hypothetical purchaser. As co-petitioners in this cause were the successors to the Iowa Nation which the Commission found owned a joint and undivided one-half interest with the Sac and Fox Nation in the southern portion of eastern Iowa. The Iowa Nation ceded this interest in this tract to the United States under the Treaty of October 19, 1838 (7 Stat. 568) which had an effective valuation date of February 28, 1839. This early 1839 valuation date was shortly after the commencement of public sales of petitioners' lands in late 1838, and was therefore at the earliest point of development of the private sale market in the cession lands. The Commission awarded the Iowa petitioners $1.60 per acre for their eastern Iowa lands while noting:

> "The prospective purchaser [of the Iowa interest in 1839] would have examined the limited private resale data available to him and discovered that land was being sold within the [eastern Iowa] tract at an average price in excess of $2.30 per acre." (32 Ind. Cl. Comm. at 26, App. 11)

[2] See footnote 1 on page 9, *supra*.

"to supply more specific findings and reasoning" so that the Court of Claims could determine whether the eastern Iowa valuation decision was "adequately supported by substantial evidence" and untainted with legal error. (196 Ct. Cl. at 549; App. 20)

Proceedings on Remand to the Commission

Because of the Court of Claims' failure in its per curiam remanding decision to discuss its prior holdings respecting the probative value of post-cession sales evidence, and anticipating that the Commission might adhere to its 1969 decision rejecting such evidence in the record, petitioners attempted to expedite the final resolution of the valuation question by timely action:

> (a) Requesting the Commission to certify to the Court of Claims the narrow question as to the weight to be given to the post-cession private sales of eastern Iowa lands;
>
> (b) Twice asking leave of the Commission to allow petitioners to submit evidence of private sales of comparable unimproved lands in nearby states at and prior to the valuation dates; and
>
> (c) Requesting that the Commission judicially notice its own findings in other cases of pre-cession considerations received for unimproved and generally comparable lands.

But all of this was wholly without success. Each request was denied; no additional evidence was received or noticed by the Commission, and it persisted in rejecting petitioners' evidence of value provided by the post-cession eastern Iowa land sales.

In its 1973 opinion on remand, the Commission acknowledged that the difference between its decisions in the eastern Iowa and the central Iowa cases was that "in Docket 153 [concerning the Sac and Fox central Iowa lands] we used as primary evidence of value the identical [private]

land sales data [in eastern Iowa] which we refused to use in these dockets [in the eastern Iowa case]." (32 Ind. Cl. Comm. at 267; App. 12)

The difference expressed in dollars is substantial. In central Iowa, the use of the private sale data produces a value of $1.40 per acre, even though central Iowa was somewhat less desirable than the eastern Iowa lands. In eastern Iowa, where the evidence was rejected, the values found were substantially lower, including only 90¢ per acre for the predominant tract. In eastern Iowa, reference by the Commission to even the earliest of such private sales produced an award to the Iowa Nation of $1.60 per acre.[1]

In its 1973 opinion, the Commission three times said that it used the government public land price of $1.25 per acre as the starting point for its valuation of petitioners' eastern Iowa lands "because the record contained no evidence of comparable private land sales to the date of taking." (32 Ind. Cl. Comm. at 262; App. 8) Petitioners' efforts to offer this evidence or to have the Commission take judicial notice of it are not mentioned in the Commission's 1973 opinion.

Second Appeal to Court of Claims

Petitioners again appealed to the Court of Claims and raised, for a second time, the errors complained of on their prior appeal and the additional error of the Commission in refusing to permit petitioners to offer additional evidence consisting of private sales of comparable lands at and prior to the valuation dates for the eastern Iowa lands. By order entered on April 25, 1975, the Court of Claims summarily affirmed the 1969 and 1973 decisions of the Commission. (App. 1) On June 27, 1975, the Court of Claims denied petitioners' motion for rehearing *en banc*. (App. 2)

[1] See footnote 1 pp. 11-12, *supra*.

REASONS FOR GRANTING THE WRIT

I.

The Decisions Below Violate Due Process, The Intent Of The Remedial Indian Claims Commission Act, And The Rule In *Sinclair Refining Company* v. *Jenkins Petroleum Co.*, 289 U.S. 689 (1933) By Depriving Petitioners Of The Right To Fair Market Value For Their Eastern Iowa Lands By Adoption Of An Erroneous Hypothetical Valuation Standard Rather Than The Best Evidence Of The Real Value Of Petitioners' Lands.

The ample grounds that support issuance of a writ of certiorari under this Point I are: (1) that the tribunals below charged with administering justice under a highly remedial federal statute have applied the wrong legal standard of valuation that in fact defeats the intent of the Act; (2) that such fundamental error was committed in violation of and by ignoring the Court of Claims own apposite valuation precedents and the decision of this Court in *Sinclair Refining;* (3) that petitioners' grounds for reversal were summarily denied without opinion by the Court of Claims although that court well knew the importance of the questions which petitioners had pressed repeatedly in six years of appeals and this refusal to render an opinion by the Court of Claims so far departs from accepted conduct in the course of judicial proceedings as to call for exercise of this Court's supervisory authority over the federal judiciary; and (4) as appears from Points I and II, because the best evidence of value has been excluded by the Commission, petitioners have been denied both substantive and procedural due process of law in violation of the Fifth Amendment of the United States Constitution.

The Intent of Congress

The Indian Claims Commission Act was designed by Congress to provide a forum whereby all Indian claims

against the United States could be heard and determined once and for all on their merits. By consent to suit against the United States on legal, equitable and moral claims, Congress intended to put Indians on at least an equal footing with respect to the loss of their property as all other citizens. That these were the broad purposes of the Act was acclaimed by all concerned with its passage.

The Attorney General:

> "The jurisdiction to be conferred on the Commission would embrace not only claims of a legal or equitable nature by also those claims which are based solely on moral or ethical grounds and are not ordinarily justi-[c]iable in a court." (From statement enclosed with letter of Hon. Tom C. Clark, Attorney General, Hearings before Senate Committee on Indian Affairs on H.R. 4497, 79th Cong., 2nd sess., p. 25)

The Secretary of Interior:

> "The bill emancipates our Indian citizens from an outworn and discriminatory statute which, since 1863, has barred them from general access to the Court of Claims. For the future they will be permitted to sue on the same basis as their fellow citizens of other races to vindicate contract and property rights." (Letter of August 1, 1946 from Hon. J. A. Krug, Secretary of Interior to President Harry S. Truman)

Congress:

> "The bill in its present form is primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted. Today any white man who has supplied goods or services to the United States under contract may, if the United States has failed to carry out its part of the bargain, go into the Court of Claims, or, in certain cases, into the Federal district courts, and secure a full, free, and fair hearing on his claims against the Government. This is an integral part of the American system of justice under which the humblest citizen and the highest official

> are equal before the law. The only American citizen today who is denied such recourse to the courts is the Indian." (House Report No. 1466, 79th Cong., 1st Sess., pp. 1-2)

The President:

> "This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. . . . [W]e stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made. . . ." (Statement by President Harry S. Truman, released August 13, 1946 upon signing Act)

The General Legal Precedents

In the present Sac and Fox case, as in most Indian cases under the Act, petitioners' damages consist of the difference between the value of the lands owned by the Indian tribe at the time of taking by the United States and the consideration paid by the United States for the lands. The manner of valuing Indian lands is therefore crucial to the achievement of the objective that Congress contemplated by passage of the Act.

Certainly Congress did not wish to make a difficult task more difficult by imposing any limitation on the reach of the Commission's investigations or as to the evidence it might consider. Yet, in the present case, by refusing to look at evidence of value beyond the cession dates, the Commission has deprived itself of the unique opportunity of establishing the value of the Sac and Fox lands at the valuation dates in terms of the broad body of real evidence established by the actual prices which the cession lands brought in the private market place some 140 years ago. By also

refusing to permit petitioners to offer evidence of private sales of comparable lands at and prior to the valuation dates, the Commission effectively eliminated all of the best evidence from its consideration. Instead, the Commission valued eastern Iowa through the eyes of a single hypothetical purchaser. This creation of the Commission is denied any glimpse of the future; he cannot foresee what the eastern Iowa lands will soon actually sell for in the market place. Certainly this fictional purchaser, if he is to be used in the valuation process, should not also be denied all knowledge of selling prices for comparable lands at and prior to the eastern Iowa valuation dates. But he was.

The Commission's refusal to permit this evidence to be received is all the more puzzling because the Commission three times says that it used the government public land price of $1.25 per acre as its starting point for valuation "because the record contains no evidence of comparable private land sales at the date of taking." (32 Ind. Cl. Comm. at 262-264; App. 8-10) The use of this valuation starting point is in itself erroneous because the Commission in its findings acknowledges that the public sale price of $1.25 per acre has little to do with land values. The price, as the Commission found, "emerged as a compromise" between members of Congress who wanted the maximum price for government land and those who believed public lands should either be given away or sold for a nominal price. (20 Ind. Cl. Comm. at 472; App. 57)

Nor does the Commission's no-hindsight rule exist as an inflexible narrow proposition of law insofar as modern day valuation matters are concerned. The courts have not permitted parties' rights to be frustrated because there is a lack of evidence of current market value; they

look willingly in these circumstances to subsequent events occurring after the cause of action arose. In the present case, no market existed for the eastern Iowa lands until the government began to sell them to the public in late 1838, between one and five years after the respective valuation dates. Under these circumstances, the applicable valuation rule is set forth in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933). The Court held that, since no current market value for a patent existed at the time of breach of the patent agreement because of the uniqueness of the patent, uses of the patent subsequent to its breach constituted discoverable evidence to prove the value of the patent at the time of breach:

> "[T]he absence of market value does not mean that the offender shall go quit of liability altogether. The law will make the best appraisal that it can, summoning to its service whatever aids it can command. . . . At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of efficiency or saving of expense. . . . This will generally be the case if the trial follows quickly after the issue of the patent. But a different situation is presented if years have gone by before the evidence is offered. *Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within. . . .*
>
> "To correct uncertain prophecies in such circumstances is not to charge the offender with elements of value nonexistent at the time of his offense. It is to bring out and expose to light the elements of value that were there from the beginning. . . .
>
> "An imaginary bid by an imaginary buyer, acting upon the information available at the moment of the breach, is not the limit of recovery where the subject of the bargain is an undeveloped patent. Information

> at such a time might be so scanty and imperfect that the offer would be nominal. The promisee of the patent has less than fair compensation if the criterion of value is the price that he would have received if he had disposed of it at once, irrespective of the value that would have been uncovered if he had kept it as his own. . . . The market test failing, there must be reference to the values inherent in the thing itself, whether for use or for exchange. . . . These will not be known by first imagining a forced sale, and then accepting as a measure its probable results. The law is not so tender to sellers in default." *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. at 697-9. (Citations omitted.) (Emphasis added.)

In a later case applying the *Sinclair Refining* doctrine for patent infringement, the federal district court for Maryland noted that it is proper to determine damages as of the time the patent issued by considering later royalties paid to the infringer, thus gaining the *"advantage of hindsight,* as permitted by Sinclair Refining Co. v. Jenkins Petroleum Process Co." *Carter Products, Inc.* v. *Colgate-Palmolive Company,* 214 F.Supp. 383, 393 n. 9 (D.Md. 1963) (Emphasis added.)

Similar post-valuation date evidence has been held admissible in eminent domain cases to establish the value of property taken at the time of condemnation. *United States* v. *Brooklyn Union Gas Co.,* 168 F.2d 391, 397 (2d Cir. 1948) (considering events occurring after condemnation of public utility franchise, the Court of Appeals noting, "It would seem an eerie conclusion that a court must resort to guess, closing its eyes to reality, when its decision must actually be formulated after the true facts have become available."); *United States* v. *237,500 Acres of Land, etc.,* 236 F.Supp. 44 (S.D. Cal. 1964), aff'd *sub nom.* 404 F.2d 336 (9th Cir. 1968) (holding that in light of the lack of market value at the date of condemnation of leasehold interest in

lands containing the mineral pumice, it was proper to consider evidence of increasing competition in the pumice market over a number of years following the date of taking); *Arkansas Louisiana Gas Co.* v. *McGaughey Bros., Inc.,* 468 S.W.2d 754 (Ark. 1971) (permitting jury consideration of state of facts available at time of trial regarding a completed gas line which was condemned prior to completion).

Although petitioners repeatedly cited *Sinclair Refining* and its progeny to both the Commission and the Court of Claims, the decisions below fail to distinguish or even cite this Court's teaching in that case.

Precedents in Indian Cases

The precedents of the Court of Claims in Indian cases involving claims under the Act and special jurisdictional acts have consistently held post-cession private sales transactions in ceded lands to be competent proof of the value of those lands. The order of the Court of Claims on the second appeal provides no enlightenment as to the status or future legal significance of these precedents. The four decisions below of the Commission and the Court of Claims do not mention these cases.

But for the Commission's decisions in the case at bar, the importance of the valuation data provided by private sales within a reasonable time after cession of Indian lands would seem too well established to require any extended argument. The first decision of the Court of Claims to consider post-cession private sales within ceded Indian territory was *Alcea Band of Tillamooks, et al.* v. *United States,* 115 Ct. Cl. 463, 504, 87 F.Supp. 938, 947 (1950), reversed as to interest, 341 U.S. 48 (1951), where evidence was presented of private sales which occurred over 20 years after the 1855 valuation date.

In *Rogue River Tribe of Indians, et al.* v. *United States,* 116 Ct. Cl. 454, 478, 89 F.Supp. 798, 803 (1950), cert. denied, 341 U.S. 902 (1951), the Court of Claims followed the *Alcea* case by considering "various elements of value . . . [including evidence of] actual disposals of the tribal lands after the taking by the Government . . ." (*Rogue River Tribe of Indians, et al.* v. *United States,* 116 Ct. Cl. at 484, 89 F.Supp. at 807) In *Osage Nation of Indians* v. *United States,* 119 Ct. Cl. 592, 97 F.Supp. 381 (1951), cert. denied, 342 U.S. 896 (1951), evidence was received of private resales within the 8-year post-cession period. The Court of Claims held that this evidence could properly be relied upon to show that the $1.25 public land sale price was a poor indication of the fair market value of the Osage lands.

The decisions in *Osage, Rogue River,* and *Alcea* were reaffirmed by the Court of Claims in *Miami Tribe of Oklahoma et. al.* v. *United States,* 146 Ct. Cl. 421, 450-451, 175 F.Supp. 926, 943 (1959):

> *"If, as in The Osage case, there is evidence of private sales not controlled by the Government's minimum statutory price for public lands, these sales should be taken into consideration in determining value. . . ."* (Emphasis added.)

In 1964, after the trial of the present case on value, and prior to the Commission's 1969 decision on value, the Court of Claims held on appeal from another decision of the Commission by certain of the Sac and Fox petitioners here—

> "We conclude that the Commission erred in disregarding substantial evidence offered by appellants as to private contemporaneous and comparable sales of lands within and adjacent to the subject tract." *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 167 Ct. Cl. 710, 719, 340 F.2d 368, 373 (1964).

The evidence submitted by the Sac and Fox included private sales occurring between 1892 and 1900, which was the

nine-year period following the cession of the Oklahoma lands involved in that proceeding.

II.

Petitioners Have Been Deprived Of Fair Market Value For Their Eastern Iowa Lands By Being Denied The Right To Submit Additional Evidence Of Value In Conformity With A New Rule Of Law Which Was Retroactively Applied To Petitioners' Case After Trial In Violation Of The Rule In *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971)

The important considerations of preventing violation of the Court's *Huson* decision and of avoiding frustration of the basic purposes of the Act are strong reasons for grant of certiorari in this case. Petitioners have suffered the retroactive application of a change in the law without being allowed to present evidence of pre-cession sales which would comply with the new standard. Thus, petitioners have been denied a hearing respecting the fair value of their lands as proven by market sales.

Petitioners believe that the record made at the trial of this case in 1962 abundantly established the best evidence of the actual value of the Sac and Fox lands through private post-cession sales of over one million acres shortly after cession. Based upon the governing decisions of the Court and the Court of Claims referred to in Point I, petitioners believed at the time of trial and they continue to believe today that the Commission erred in failing to give substantial probative weight to this best evidence of value. The Commission, however, stated in its 1973 opinion the contrary view that it chose as its valuation base the $1.25 public land sale

> ". . . price because the record contained no evidence of comparable private land sales prior to the date of taking." (32 Ind. Cl. Comm. at 262; App. 8)

This statement, repeated by the Commission three times (32 Ind. Cl. Comm. at 261-3; App. 8-10) in its opinion, is legally erroneous and factually misleading.

The only reason that the Sac and Fox petitioners did not satisfy the Commission's erroneous preference for pre-cession private sales is because the Commission's own orders twice denied petitioners the right to present such evidence following the Court of Claims remand in 1971. At the time those orders were entered, petitioners were preparing pre-cession sale data for submission through the work of abstractors who had already been engaged by petitioners and who were actively compiling such pre-cession land sale data for adjoining and generally comparable (though less valuable) Missouri lands. Petitioners represented to the Commission that they expected to prove by this evidence average pre-cession private sale considerations of over $2 per acre.

Evidence of private sales of comparable lands in other states prior to the cession dates was not offered by petitioners at the time of trial in 1962 because there was then no Supreme Court or Court of Claims precedent which would foreshadow the holding of the Commission in the present case that post-valuation private sales of the lands being valued would not be considered as proof of the value of those lands. If the Commission may change the law and hold that post-cession private sale data should not be used in the valuation process, this represents a change in applicable legal precedent which, in petitioners' view, originated with the Commission's 1969 opinion in this case.[1] In no event should such a change be applied retro-

[1] The Commission is bound by the precedents of the Court and the Court of Claims, and in petitioners' view, the Commission does not have the power to change or depart from the legal principles established by those decisions. But if it is assumed that the Commission may establish its own valuation methods without regard to the prior precedents of those higher federal courts, a new legal principle should not, without warning and without relief, be applied retroactively to the detriment of the Sac and Fox petitioners in this case.

actively so as to preclude appellants from an evidentiary hearing in terms of the new rule of law.

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), the Court stated criteria which should be considered as to whether a change in legal precedent should be retroactively applied:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra [392 U.S. 481 (1968)], at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra [393 U.S. 544 (1969)], at 572. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Linkletter v. Walker, supra, at 629. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' Cipriano v. City of Houma, supra [395 U.S. 701 (1969)], at 706."

In view of the broad remedial purposes of the Indian Claims Commission Act and in terms of the retroactivity criteria established by the Court, the Commission should have permitted the Sac and Fox petitioners to offer evidence of private land sales in other states which took place prior to the cession dates. The Commission repeatedly refused to allow the presentation of such evidence and this was error denying petitioners due process of law.

CONCLUSION

The Sac and Fox petitioners have never been afforded a hearing on the best evidence of value of their eastern Iowa lands, whether that best evidence is the post-cession sale transactions in those lands as petitioners contend, or private sales transactions in comparable lands at or prior to the cession dates as claimed for the first time in the Commission's 1969 opinion. The Commission rejected the former evidence and refused to permit petitioners to offer the latter evidence. By this failure to grant a hearing with respect to the best evidence of value of the cession lands, petitioners are deprived of due process and the principal purpose of the Indian Claims Commission Act is violated because the claim of the Sac and Fox Nation for the wrongful taking of these incomparable lands will not have been fairly resolved and that claim will still remain.

Accordingly, petitioners respectfully pray that the Court grant a writ of certiorari herein so that this case may be remanded to the Court of Claims for a determination of the fair market value of the cession lands in accordance with the Court of Claims' own governing precedents and this Court's rule in *Sinclair Refining*. Alternatively and secondarily, petitioners respectfully pray that the Court grant this petition for a writ of certiorari to summarily vacate the decisions below and to remand this case to the Commission with instructions to reopen the record to permit petitioners to submit evidence of pre-cession sales in tracts comparable to petitioners' eastern Iowa lands.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75- 475

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,

Petitioners

v.

THE UNITED STATES OF AMERICA,

Respondent

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

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September 25, 1975

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IN THE UNITED STATES COURT OF CLAIMS

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL. v. THE UNITED STATES	App. No. 7-74 and App. No. 9-74

Before SKELTON, *Judge,* Presiding, DURFEE, *Senior Judge,* and KUNZIG, *Judge.*

ORDER

These cases come before the court on motions, filed May 14, 1975, by the petitioners (the various Tribes of Indians) for rehearing *en banc* pursuant to Rules 7(d) and 151 in both cases. Upon consideration thereof, without oral argument, by the five active Judges of the court (Judges Davis and Kashiwa not participating) as to the suggestions for rehearing *en banc* under Rule 7(d), which suggestions are denied, and further having been so considered by the panel listed above as to the motions for rehearing under Rule 151,

IT IS ORDERED that petitioners' said motions, filed May 14, 1975, for rehearing be and the same are denied.

BY THE COURT

ROBERT L. KUNZIG
Judge, acting for the
Presiding Judge

June 27, 1975

IN THE UNITED STATES COURT OF CLAIMS

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL., AND RELATED APPEALS, *Appellants,* v. THE UNITED STATES, *Appellees.*	App. No. 7-74

Before SKELTON, *Judge,* Presiding, DURFEE, *Senior Judge,* and KUNZIG, *Judge.*

ORDER

This case comes before the court on appeal from the decision of the Indian Claims Commission in its Dockets 158, 209 and 231, having been presented and submitted to this court on the briefs and oral argument of counsel. Upon consideration thereof,

IT IS ORDERED that the decision of the Indian Claims Commission from which the appeals have been taken be and it is *affirmed.*

BY THE COURT

BYRON SKELTON
Byron Skelton
Judge, Presiding

April 25, 1975

32 Ind. Cl. Comm. 256

BEFORE THE

INDIAN CLAIMS COMMISSION

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al., **THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, et al.,** **THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,** *Plaintiffs,* v. **THE UNITED STATES OF AMERICA,** *Defendant.*	**Docket No. 158** **Docket No. 209** **Docket No. 231**

Decided: November 23, 1973

Appearances:

Aaron J. Kramer and George B. Pletsch, Attorneys for the Sac and Fox Tribe of Indians of Oklahoma. Schiff Hardin Waite Dorschel & Britton were on the brief.

Lawrence C. Mills, Attorney for the Sac and Fox Tribe of the Mississippi in Iowa. Mills and Garrett were on the brief.

Stanford Clinton, Attorney for the Sac and Fox Tribe of Missouri.

Richard L. Beal, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

These cases are before us again on remand from the Court of Claims. In its per curiam opinion of November 12, 1971, the court stated that [256] it was "unable, on the present opinion and findings of the Indian Claims Commission in Docket Nos. 158, 209, 231 . . ., to determine if the Commission's ultimate conclusions as to valuation of the tracts involved are adequately supported by substantial evidence and untainted by legal error . . . ." *Sac and Fox Tribe of Indians* v. *United States,* 196 Ct. Cl. 548, 549 (1971). Accordingly, the court remanded these cases to the Commission "for further proceedings in conformity with this order, to supply more specific findings and reasoning as to the valuations adopted for the tracts involved in Docket Nos. 158, 209, 231." *Id.* at 550. We shall attempt in this opinion to provide additional reasons to support the conclusions we have reached on the values of the subject tracts on the dates they were acquired by the defendant.

In our decision of May 12, 1969, in these dockets, 20 Ind. Cl. Comm. 438, we determined the fair market value of four land cessions. We valued the interests of the Sac and Fox Nation in Royce Areas 175, 226 and 244, which it ceded to the United States under the treaties of September 21, 1832, 7 Stat. 374, September 28, 1836, 7 Stat. 517, and October 21, 1837, 7 Stat. 540, respectively, and the undivided one-half interest of the Iowa Nation in some 2,345,133 acres in Royce Areas 175, 226 and 244, which it ceded to the United States by the Treaty of October 19, 1838, 7 Stat. 568. The Commission concluded that the per acre value of Royce Area 175 was $0.90 in 1833 (plus an additional $240,000 for lead deposits), that Royce Area 226 was [257] worth $1.25 per acre in 1837, that Royce Area 244 was worth $1.10 per acre in

1838, and that the value of the 2,345,133 acre Iowa tract was $1.60 per acre in 1839. We entered final awards totalling $4,474,378.00 for the Sac and Fox plaintiffs and $1,795,506.40 for the Iowa plaintiffs. On May 11, 1970, the Sac and Fox plaintiffs filed a notice of appeal from our 1969 decision. The Iowa plaintiffs chose not to appeal our decision, and by the Act of July 6, 1970, 84 Stat. 376, Congress appropriated funds to satisfy our judgment in their favor.

The opinion of the Court of Claims is quite brief and gives us few clues as to what the court found lacking in our decision. The court merely states that

> the Commission's reasoning is too summary, and too lacking in detail and specificity to comply fully with 25 U.S.C. § 70r(3) and to enable the court properly to exercise its review function; in this connection, the court cannot properly determine, from the present opinion and findings, whether there is a significant and unwarranted inconsistency between the valuations (or the theories underlying them) adopted in Docket Nos. 158, 209, 231, and that adopted, some nine months later, in closely related Docket No. 153.

196 Ct. Cl. at 549. The Commission has carefully examined its opinion and findings, in light not only of the majority and dissenting opinions of the Court in this case but also of the per curiam and concurring opinions in *Seminole Indians* v. *United States,* 197 Ct. Cl. 350, 455 F.2d 539 (1972) (*remanding,* Dockets 73 and 151, 23 Ind. Cl. Comm. 108 (1970)), and the order in *United States* v. *Ponca Tribe of Indians,* [258] 197 Ct. Cl. 1065 (1972) (*remanding,* Docket 323, 24 Ind. Cl. Comm. 339 (1970)), in an attempt to discover what changes or additions would be necessary to satisfy the requirements of 25 U.S.C. § 70r(3) as the Court of Claims sees them. Our conclusions make up the remainder of this opinion.

EVIDENTIARY FINDINGS

The Commission is of the opinion that its evidentiary findings adequately and accurately relate the facts as established by the evidence, and that more specific evidentiary findings are not necessary to satisfy the mandate of the Court of Claims. In findings 1 through 8 we described the parties and found they had standing to bring these claims, identified the subject lands, indicated the acreages of the subject tracts and their respective dates of cession, and listed the present-day Iowa counties which are included in the tracts. In finding 9 we described the climate of the subject tracts and found their temperatures, rainfall and growing season to be ideal for agricultural purposes. Finding 10 describes the six rivers which drain the subject tracts.

In finding 11 we found the topography of the subject tracts to be generally favorable to agriculture. In finding 12 we found that the soils of the area were excellent, and in finding 13 we described the crops which were grown by the early settlers. In finding 14 we indicated that there was adequate grazing for livestock within the subject areas as well as ample surface water both for human and animal consumption. We found, in finding 15, that there was adequate timber [259] to satisfy the needs of early settlers, and, in finding 16, that water power was sufficient to operate mills both for the sawing of timber and the grinding of grain into flour. In finding 17 we indicated that the subject tracts had adequate stone for building purposes, and coal for local consumption. In finding 18 we found that the subject tracts were readily accessible to new settlement by means of water transportation.

Findings 19 and 20 describe the entry of squatters onto the subject tract prior to the land being opened for public sale, the development of government within the area, the surveying of the area and establishment of land districts,

and the enactment of the Pre-emption Law. Findings 21 and 22 describe the growth of population both within Iowa and in the neighboring areas of Illinois and Missouri. Finding 23 describes the effect of the Pre-emption Law and the operation of the "claims" clubs.

In findings 24 and 25 we found that at the time of the cessions there was a vast expanse of public lands in neighboring states available for purchase at the uniform price of $1.25 per acre. In finding 26 we described the public sale of lands within the subject tracts after they became open for settlement in 1838. In finding 27 we described the private sales of land which took place in the subject tracts between 1839 and 1849. We found that the average transaction during that period was of a tract of 70.2 acres at a price of $2.46 per acre. We further found that the continued availability of public land at $1.25 per acre prevented any rapid increase in land prices. In finding 28 [260] we indicated the costs that a settler would face in improving his land, and in finding 29 described business conditions during the 1833 to 1839 period. In finding 30 we found the highest and best use for the subject tracts was subsistence homestead farming including the raising of livestock for local consumption.

In finding 31 we discussed the views expressed by the plaintiffs' expert witnesses, Drs. Hammer and Barlowe. We found that the opinion expressed by these experts was based on a "bona fide market" approach, which we found to be unacceptable as not reflecting the actual conditions which would have affected the land market in the subject tracts as of their respective dates of cession. In finding 32 we discussed the views expressed by the defendant's expert witness, Dr. Murray. We found that Dr. Murray's opinion was based on a "market value" approach, which we found to be acceptable, although we found Dr. Murray's conclusions to be too conservative.

CONCLUSIONS OF VALUE

The Commission's conclusions on value appeared in findings 33, 42, 47, 50, and 53. We have decided that, with the exception of our findings and conclusions with respect to the Dubuque lead district (findings 34 through 42), some elaboration on the method we used to reach our conclusions is needed to satisfy the requirements of 25 U.S.C. § 70r(3) as the Court of Claims interpreted them. [261]

We valued the Sac and Fox interest in Royce Area 175 as of February 8, 1833, the effective date of the 1832 treaty. In finding 33 we indicated the various factors which a prospective purchaser of this tract would have taken into consideration in deciding on the price he would be willing to pay for the tract. We then stated our conclusion that the fair market value of the tract was $.90 per acre. The method we used to reach this result was as follows:

As a starting point for our evaluation we used the $1.25 per acre price at which public lands were being sold. We chose this price because the record contained no evidence of comparable private land sales prior to the date of taking. The prospective willing purchaser in 1833 would have had only the public land sales in Illinois and Missouri as a reference point to use in calculating the value of the subject tract.

We then considered the factors which a prospective purchaser might have found favorable and which would have increased the price he would have paid for Royce 175. These included, among others, the excellent soils of the area, its ideal climate, including both temperatures and rainfall, the presence of adequate water and building materials, and the availability of water transportation. In sum, the prospective purchaser would have realized that the lands of Royce 175 were superior to the public lands available for sale in

Missouri and Illinois, and would have concluded that he could resell them for a price in excess of $1.25 per acre. [262]

We then considered the various discounts that the prospective purchaser would have applied in his calculations. The primary discount would have been the size of the tract. Royce 175 contained more than 5⅓ million acres of unimproved land. For the prospective purchaser to adapt the tract to its highest and best use he would have to subdivide it and resell it over a period of time. He would be faced with the costs of surveying, managing, and selling the land, as well as the interest payments on his investment money. Another discount factor would have been the remoteness of the greater portion of the tract. The mainstream of population growth was in Illinois and Missouri, and much of Royce 175 was far removed from these population centers.

Finally, we balanced the discount and plus factors and concluded that the 1833 purchaser of Royce Area 175 would have expected an overall discount of $.35 per acre from the $1.25 starting price, and therefore would have been willing to pay an average of $.90 per acre for the entire tract.

We valued the Sac and Fox interest in Royce Area 226 as of October 13, 1837, the effective date of the 1836 treaty. The factors we considered and our conclusion that the tract was worth $1.25 per acre are set out in finding 47. The method we used to reach this result was similar to that we used in valuing Royce 175. As the record contained no comparable private land sales that would have been known to an 1837 prospective purchaser, we again chose $1.25 per acre as a starting point. Among the positive factors we then considered were the excellence of the [263] soil and the climate, the good location of the land, and the political organization in adjacent southeastern Iowa. The negative factor we considered was the imminent opening of Govern-

ment lands in Royce Area 175 to public sale. The prospective purchaser would have realized that the presence of millions of acres of public lands, comparable in quality to the lands of the subject tract, available for purchase at $1.25 per acre, would greatly depress the private land sales market. We concluded that the positive and negative factors would cancel each other and that the prospective purchaser would be unwilling to pay more than an average of $1.25 per acre for the entire tract.

The Sac and Fox interest in Royce Area 244 was valued as of February 16, 1838, the effective date of the 1837 treaty. In finding 50 we indicated the various factors which we considered in reaching our conclusion that the tract was worth $1.10 per acre. In reaching this result we again began our calculations with a base price of $1.25 per acre, as there were no comparable private sales in the record which would have been known to an 1838 purchaser. The positive factors we then applied to this base price related to the excellence of the subject tract for subsistence farming.

We then considered the negative factors that the prospective purchaser would have applied in calculating the price he would be wil'ng to pay for the tract. We applied a small discount for the size of the tract. Because of the availability of millions of acres of public lands of comparable quality, the prospective purchaser would have expected to [264] hold the tract for a long time before he could sell it. Thus he would have faced the costs of surveying, management, and resale. An additional negative factor would have been the remoteness of the northern half of Royce 244.

Considering both the positive and negative factors we concluded that the 1838 prospective purchaser would have expected a $.15 per acre discount from the base price, and therefore would be willing to pay an average of $1.10 per acre for all of Royce Area 244.

We valued the Iowa interest in Royce Areas 175, 226 and 244 as of February 28, 1839, the effective date of the 1838 treaty. The factors which we considered in reaching our conclusion that this interest was worth an average of $1.60 per acre are indicated in finding 53. The method we followed in reaching our conclusion was similar to that we had used in valuing the Sac and Fox tracts.

We again used a basic price of $1.25 per acre as a starting point for our calculations. Although the record did contain evidence of some private land sales within the subject tract prior to the date of cession, the prospective purchaser would have considered these to be too few to serve as a basis for his calculations. He would have relied instead upon the $1.25 per acre price of public land.

We then considered the many positive factors which the prospective purchaser would have applied in deciding on the price he would pay for the Iowa interest. The Iowa tract contained excellent farmland; its soil and climate were ideal for subsistence farming. Much of the [265] area had already been settled, and local and territorial government existed within the tract. Public land sales were progressing at a rapid rate and it would have been evident to the purchaser that the population of southeastern Iowa was expanding rapidly. Furthermore the tract was favorably located, being situated along the path of westward migration. The prospective purchaser would have examined the limited private resale data available to him and discovered that land was being sold within the tract at an average price in excess of $2.30 per acre.

We then considered the discounts that the prospective purchaser would apply. The sole discount would have been for size. The Iowa tract contained in excess of 2⅓ million acres. In reselling the tract the prospective purchaser would have to hold the tract for some time and incur the

costs of management and sale. The size discount would have been somewhat reduced because most of the tract had already been surveyed and the purchaser could have thus avoided that cost.

We balanced the discount and plus factors and concluded that the 1839 purchaser of the Iowa interest in Royce Areas 175, 226 and 244 would have expected to pay $.35 per acre in excess of the base price, and therefore would have been willing to pay an average of $1.60 per acre for the entire tract.

DOCKET 153 DISTINGUISHED

The brief opinion of the Court of Claims in these cases appears to indicate that the court saw some inconsistencies between our valuation [266] in these cases and our valuation in Docket 153, *Iowa Tribe* v. *United States,* 22 Ind. Cl. Comm. 385 (1970). In Docket 153 we valued the respective interests of the Iowa Nation and the Sac and Fox Nation in Royce Area 262, a nearly 12 million acre tract to the west of and adjacent to Royce 244. We concluded that as of February 28, 1839, the Iowa interest had an average value of $.90 per acre, and that as of February 15, 1843, the Sac and Fox interest had an average value of $1.40 per acre. An examination of plantiffs' appellate brief has led the Commission to believe that the apparent inconsistency which the court might have seen in our two decisions is that in Docket 153 we used as primary evidence of value the identical land sales data which we refused to use in these dockets. We have reexamined our decision in Docket 153 and conclude that there is no inconsistency between the two valuations.

The valuation dates in the present cases were February 8, 1833, October 13, 1837, February 16, 1838, and February 28, 1839. The records of private land sales placed in evi-

dence by the plaintiffs covered the period 1839 through 1849. Thus, it is clear that, with the exceptions of the few sales which had taken place prior to the 1839 Iowa cession, these private land sales would not have been known to a prospective purchaser on the valuation dates. The prospective purchaser could not have considered these sales in calculating the price he would be willing to pay for the subject tracts. For the same reason, when we valued these tracts we did not use this sales data as primary evidence of value. [267]

In Docket 153, on the other hand, the valuation dates were February 28, 1839, and February 15, 1843. Therefore, much of the private sales data placed in evidence by plaintiffs would have been known to a prospective purchaser, especially at the 1843 valuation date. Such a purchaser would have taken these sales into account in calculating his purchase price for the subject tracts. In valuing these tracts, therefore, we did consider, as primary evidence of value, the records of private sales during the 1839 to 1849 period.

That our methods of valuation in the two decisions are consistent is illustrated by the manner in which we handled evidence of postcession land sales in Docket 153: In that case plaintiff not only introduced evidence of 1839 to 1849 private land sales in Royce Areas 175, 226 and 244, but also evidence of postcession sales in Royce 262, the subject tract in that docket. In rejecting such data as primary evidence of value we stated, "Resales of land in the cession area, we feel, do not carry great weight since they would not have been known to a purchaser on the valuation dates and because they reflect a land market with far different patterns of settlement than existed on the earlier valuation dates." 22 Ind. Cl. Comm. at 387. It seems clear that our treatment of evidence of postcession private resales within [268] the sub-

ject tracts was identical in Docket 153 and in the present cases.

JOHN T. VANCE
John T. Vance, Commissioner

We Concur:

JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

BRANTLEY BLUE
Brantley Blue, Commissioner [269]

32 Ind. Cl. Comm. 256

BEFORE THE

INDIAN CLAIMS COMMISSION

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,	
THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, et al.,	Docket No. 158
THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,	Docket No. 209
Plaintiffs,	
v.	Docket No. 231
THE UNITED STATES OF AMERICA,	
Defendant.	

FINAL AWARD ON REMAND

Upon the findings of fact and opinion entered herein on May 12, 1969, 20 Ind. Cl. Comm. 439, upon the amendments to those findings and opinion entered herein by order on February 11, 1970, 22 Ind. Cl. Comm. 439, and upon the opinion entered herein this day, all of which are made a part of this order, the Commission concludes as a matter of law that:

1. Under the Treaty of September 21, 1832 (7 Stat. 374), hereinafter referred to as the Treaty of 1832, the

Sac and Fox Nation ceded to the United States all its right, title, and interest to the lands in Royce Area 175 in eastern Iowa; and, that, as of February 9, 1833, the effective date of the Treaty of 1832, the fair market value of the Sac and Fox interest in Royce Area 175 was $4,276,320.

2. Under the Treaty of 1832, and the Missouri Sac and Fox Treaty of October 21, 1837 (7 Stat. 543), the United States paid $745,741.79 to the Sac and Fox Nation for its interest in Royce Area 175.

3. The payment of $745,741.79 by the United States for the Sac and Fox interest in Royce Area 175, which interest had a then fair market value of $4,276,320, was payment of an unconscionable consideration under the Indian Claims Commission Act, and the defendant is therefore liable to the Sac and Fox petitioners for additional compensation in the sum of $3,530,578.21. [270]

4. Under the Treaty of September 28, 1836 (7 Stat. 520), hereinafter referred to as the Treaty of 1836, the Sac and Fox Nation ceded to the United States its undivided one-half interest in Royce Area 226, a 217,600 acre tract in southeastern Iowa, which Sac and Fox interest, as of October 13, 1837, the effective date of the Treaty of 1836, had a fair market value of $136,000.

5. Under the Treaty of 1836 and the Missouri Sac and Fox Treaty of October 21, 1837, *supra,* the United States agreed to pay and did pay to the Sac and Fox Nation for its undivided one-half interest in Royce 226 the sum of $193,056.12, which sum is in excess of its then fair market value.

6. The defendant is not liable to the Sac and Fox petitioners for additional compensation for the cession of the Sac and Fox undivided one-half interest in Royce Area 226 under the Treaty of 1836.

7. Under the Treaty of October 21, 1837 (7 Stat. 540), hereinafter referred to as the Treaty of 1837, the Sac and Fox Nation ceded to the United States all its right, title, and interest to the lands in Royce Area 244 in eastern Iowa, which Sac and Fox interest, as of February 13, 1838, the effective date of the Treaty of 1837, had a fair market value of $1,089,926.85.

8. Under the Treaty of 1837, and the Missouri Sac and Fox Treaty of October 21, 1837, *supra,* the United States agreed to pay and did pay $146,127.06 to the Sac and Fox Nation for its interest in Royce Area 244.

9. The payment of $146,127.06 by the United States for the Sac and Fox interest in Royce Area 244, which interest had a then fair market value of $1,089,926.85, was payment of an unconscionable consideration under the Indian Claims Commission Act, and the defendant is therefore liable to the Sac and Fox petitioners for additional compensation in the sum of $943,799.79.

10. No gratuitous offsets are chargeable against the several judgments herein, said gratuities having been either set-off against the awards made in Docket No. 138, *Iowa Tribe* v. *United States,* 15 Ind. Cl. Comm. 42, or waived by the defendant. [271]

It Is Therefore Ordered that the Sac and Fox petitioners, for and on behalf of the Sac and Fox Nation and all of its members, do have and recover of and from the defendant,

a. In Docket No. 158 the sum of $3,530,578.21.

b. In Docket No. 231 the sum of $943,799.79.

It Is Further Ordered that the claim of the Sac and Fox petitioners in Docket No. 209 for additional compensation for the cession to the United States of all right, title and

interest in Royce Area 226 under the provisions of the Treaty of 1836, be, and the same is hereby, dismissed.

Dated at Washington, D. C., this day of

JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

JOHN T. VANCE
John T. Vance, Commissioner

RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

BRANTLEY BLUE
Brantley Blue, Commissioner [272]

196 Ct. Cl. 548

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL. v. THE UNITED STATES

Appeal No. 4-70

Ind. Cl. Comm. Docket Nos. 158, 209, 231
20 Ind. Cl. Comm. 439
22 Ind. Cl. Comm. 439

[Decided November 12, 1971]

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

Indian claims; appeal from Indian Claims Commission; valuation.—

The Sac and Fox Tribes have appealed from the decision of the [548] Indian Claims Commission which held that the Tribes were entitled to additional compensation for three tracts of tribal lands in eastern Iowa (Cessions 175, 226 and 244) ceded to the United States by treaties entered into in the 1830's. Each tract of land was the subject of a separate petition, the three cases being consolidated for trial. Appellants dispute the Commission's determinations of the fair market value of the lands. The court remands this case to the Commission for further proceedings to supply more specific findings and reasoning as to the Commission's valuations.

Aaron J. Kramer for appellants. *George B. Pletsch,* attorney of record for The Sac and Fox Tribe of Indians of Oklahoma, et al; *Lawrence C. Mills,* attorney of record for The Sac and Fox Tribe of the Mississippi in Iowa, et al; and *Stanford Clinton,* attorney of record for The Sac and Fox Tribe of Missouri, et al.

Richard L. Beal, with whom was *Assistant Attorney General Shiro Kashiwa* for appellee.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges.*

PER CURIAM: This case comes before the court on appeal from the Indian Claims Commission, and, after considering the briefs and record and hearing oral argument of counsel, the court has concluded that, as in *United States* v. *Nez Perce Tribe,* 194 Ct. Cl. 490, 503, *cert. denied,* 404 U.S. 872 (1971), the court is unable, on the present opinion and findings of the Indian Claims Commission in Docket Nos. 158, 209, 231 (now under review), to determine if the Commission's ultimate conclusions as to valuation of the tracts involved are adequately supported by substantial evidence and untainted by legal error; the Commission's reasoning is too summary, and too lacking in detail and specificity, to comply fully with 25 U.S.C. § 70r(3) and to enable the court properly to exercise its review function; in this connection, the court cannot properly determine, from the present opinion and findings, whether there is significant and unwarranted inconsistency between the valuations (or the theory underlying them) adopted in Dockets Nos. 158, 209, 231, and that adopted, some nine months later, in closely related Docket No. 153. [549]

IT IS THEREFORE ORDERED that this case be and hereby is remanded to the Indian Claims Commission for further proceedings in conformity with this order, to supply more specific findings and reasoning as to the valuations adopted for the tracts involved in Docket Nos. 158, 209, 231.

IT IS FURTHER ORDERED that this remand is without prejudice to the right of appellants to raise again, on any further appeal to the court in this case, any point or issue raised in the instant appeal.

COWEN, *Chief Judge,* dissenting:

The first ground for the Court's order of remand is that the Commission's reasoning is lacking in the detail and specificity needed to enable the Court to determine whether

the Commission's conclusions on valuation are supported by substantial evidence and untainted by legal error. With deference, I do not join in the Court's order, because I think the remand is unnecessary in this case. I also think that the order imposes requirements on the Commission that are beyond the purview of the applicable statute and contrary to the rules of law generally followed in this court and other courts for the review of a factfinder's determination of the value of property. I do not read 25 U.S.C. 70r(3) as requiring the Commission to pinpoint its value determinations by setting out in detail the arithmetical computation or formula used in a case where the evidence is conflicting and the value found is well within the range of values testified to by the witnesses. All that the statute requires is that the Commission provide a statement of the reasons for its findings and conclusions. I think it has done so in this case.

In the beginning of its opinion, the Commission pointed out that on the basis of the evidence offered by petitioners, they claimed that the value of the lands, exclusive of the lead lands in Dubuque, Iowa, was from $2.50 to $3 or more per acre in the 1833-39 period. In contrast, the value figures claimed by defendant, on the basis of its evidence, were in [550] the range of 43 cents to 80 cents per acre for the same lands [Appendix 4].[1]

The Commission then proceeded to set forth the reasons on which its determinations of value were based. Among these were the lack of a land market of any kind in eastern Iowa in 1833, whereas across the Mississippi River and in Illinois and in Missouri, there was a large quantity of public land available at $1.25 per acre [Appendix 4-5]; various

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[1] The reference here and elsewhere to the Appendix is to pertinent pages of the opinion and findings of fact of the Commission in this case and in Docket No. 153 of the Indian Claims Commission, all of which are printed in the Appendix to the Brief of the Appellants.

physical and economic factors, including the excellent soils and topography of the lands, the favorable climate and growing season, the presence of good stands of timber along the water courses, and the rapid growth of population during the 1833-39 period [Appendix 7].

The Commission also referred to the establishment of territorial and local governments in Iowa, and the passage of the 1838 Preemption Act; the volume and rate of nearby public land sales from 1820 to 1850, and private sales that occurred in the ceded areas from 1838 through 1856 [Appendix 8].

The Commission also took into account prevailing business conditions, farm prices and farm costs, current interest rates, the lack of a sound currency and the scarcity of money [Appendix 8]. The Commission also called attention to the very large size of the ceded areas and the requirement that each tract be valued as a whole [Appendix 9].

In each instance, the Commission's statement of the reasons for its conclusions is backed up by carefully prepared and detailed findings of fact. Finally, the Commission stated that, in the absence of comparable sales in an actual market, it utilized the data offered by defendant's expert witness, Dr. William G. Murray, as it had done with similar data in other cases. However, his testimony was considered on an equal footing with other value criteria, and the Commission determined that his ultimate conclusions as to value were too [551] low [Appendix 6].[1] I will not discuss the other criteria considered by the Commission, because I think that its opinion and findings adequately set forth the reasons for its conclusion. The situation here is unlike that before the Court in the *Nez Perce* case, where the Court found that the Commission increased the value of Indian land from $4 to

[1] A full statement of the data utilized by Dr. Murray is contained in Commission finding 32 at page 38 of the Appendix.

$5.50 per acre without making any findings to support the new figure.

A determination of the fair market value of Indian land is a difficult task and often requires a determination of values as of a date which precedes the date of the trial by more than one hundred years. Vast acreages of land, far exceeding the acreage included in any private sales, are involved, and usually there is no evidence of truly comparable sales. In such situations, the trier of the facts must rely primarily upon the testimony of expert witnesses. Where, as in most cases, the testimony of the expert witnesses is conflicting, the trier of the facts is the judge of the weight to be given their testimony. It is his function to decide which witnesses are to be relied on and, in determining the value of property, he may find an amount that lies between the figures advanced by different witnesses. This is a rule which is followed in the Court of Claims and I believe in most courts. *Toronto, Hamilton & Buffalo Nav. Co.* v. *United States,* 116 Ct. Cl. 184, 88 F.Supp. 1016 (1950). The trial commissioners of the Court of Claims often determine the value of Indian land and other property in cases where the testimony of expert witnesses is in conflict. Frequently, the commissioners find a value which is somewhere between the figures advanced by the opposing experts. When this occurs, I have never known of a case where the court required them to set forth the mathematical computations or other detailed methods by which they made their determinations. We should not impose a more exacting standard on the Indian Claims Commission.

The second basis for the court's remand, as stated in the order, is the court's inability to determine whether there is a [552] significant and unwarranted inconsistency between the valuations (or the theory underlying them)

adopted in this case and that adopted later in Docket No. 153. The alleged inconsistency is based upon the appellant's contention that in Docket No. 153, the Commission relied on evidence offered by them of private resales of land in eastern Iowa, whereas in this case, the Commission rejected the same evidence.

There was a time spread of many years between the valuation dates of the lands involved in this appeal and the relevant valuation dates of the lands in Docket 153. More importantly, in the latter period there was a rapid growth of population in Iowa, a greater knowledge of the fertility and worth of the land, and other causes for the increase in land values as detailed in the Commission's findings of fact [Appendix 77-86]. In my opinion, the findings of fact and opinions of the Commission in both cases show that there was a rational and valid basis for the differences in probative value which the Commission gave to the evidence of resales of private land in eastern Iowa.

In both cases, the Commission admitted and considered evidence of private resales of land lying within the ceded areas. The Commission attached little weight to these resales, because of the dates on which the sales were made and other factors affecting the land values at that time. Thus, in the case now before us, the Commission's opinion states as follows:

> The private sales data in the record was *limited exclusively* to those transactions that occurred in the *ceded* areas beginning from about 1838 through 1856. • • • [Emphasis supplied]
>
> Except for the relatively few number of sales that occurred prior to and at the time of the 1838 effective date of the Iowa cession, the [448] bulk of the private sales in eastern Iowa do not qualify as comparable sales, but they do earn some probative value as hindsight or confirmatory evidence. • • • [Appendix 8]

The petitioners in Docket 153 also presented evidence of the resale prices of the ceded lands involved in that case, as shown in Commission finding 27 [Appendix 82]. Just as in the case [553] before us, the Commission gave little weight to the evidence of the resale prices of the ceded lands in Docket 153. In that connection, the Commission said:

> Results of these resales in Cession 262 would not have been known to a purchaser as of the valuation date of either portion of the tract, and thus can be regarded only as hindsight information which can be used only to corroborate findings of value based on [405] information known as of the valuation date. [Appendix 82]

In its opinion in Docket 153, the Commission gave the following explanation of its reasons for giving greater weight to the evidence of the private resales of the lands in eastern Iowa than was accorded to such evidence in this case:

> Resales of land in the cession area, we feel, do not carry great weight since they would not have been known to a purchaser on the valuation dates and because they reflect a land market with far different patterns of settlement than existed on the earlier valuation dates. The resales in eastern Iowa from 1838 to 1843 are, we feel, of more relevance. Many of them would have been known to a purchaser, particularly as of the valuation date of 262 North. They reflect the settlement pattern in Iowa at the relevant valuation dates and thus indicate the market expectations which a purchaser might reasonably have in regard to Cession 262. The differences between the lands in eastern Iowa and Cession 262 are relatively minor, and we have examined those differences in our findings of fact. [387] [Appendix 65-66]

Additional reasons for the Commission's treatment of the evidence of the resales in eastern Iowa are set forth in the

findings of fact in Docket 153 [Findings 25, 26, and 27—Appendix 80-82]. One of the most significant of these findings was the following:

> As of the cession dates, a purchaser would estimate his return on investment by examining resales of lands in eastern Iowa (Royce Areas 175, 226, and 224). A purchaser would know that while the [402] eastern Iowa lands were generally comparable to those in Cession 262, the eastern lands had certain advantages not enjoyed by the lands further west. * * * [Appendix 80] [554]

In summary, I would conclude that appellants have failed to demonstrate that the claimed inconsistency amounts to an error of law that justifies a remand in this case.

SKELTON, *Judge, dissenting:*

I join in the dissent of Chief Judge Cowen.

In addition, I would add that the court in directing the Indian Claims Commission to be consistent as to the valuations (or the theory underlying them) in this case and those in Docket 153 amounts to requiring the Commission to do what the court itself refused to do in the cases of *Virginia Electric & Power Co.* v. *United States,* 188 Ct. Cl. 120, 411 F.2d 1314 (1969) and *Pennsylvania Power & Light Co.* v. *United States,* 188 Ct. Cl. 76, 411 F.2d 1300 (1969). Those two cases were pending in this court at the same time and were decided the same day. They involved power companies operating at the same time in the same general area (Virginia and Pennsylvania) in the same manner. Both companies sought the same relief (*i.e.,* determination of the useful life of transmission and distribution easements and initial clearing costs). While there was some evidence in the Vepco case that was not present in the Pennsylvania Power & Light case, an expert witness named John J. Reilly testified in both cases and his testimony was practically the

same in both cases. The court refused to take judicial notice of the facts, etc., in both cases, used a different standard in one to that used in the other, and rendered a decision more favorable to Vepco than to Pennsylvania Power & Light. (See the dissenting opinion of Judges Skelton and Collins in the Vepco case, 188 Ct. Cl. 120, 130.). The facts and issues in those cases were much closer and more related than those in the case before us as compared to those in Docket 153.

As pointed out by Chief Judge Cowen, the case before us is quite different to that in Docket 153, not only as to the facts, but also as to the period of time involved (ten years—1833 and 1843).

No purpose will be served by sending the case back to the Commission except to cause the Commission to do a lot of [555] extra work to reach the same result. Furthermore, it will cause additional delay for the Indians, who have waited long enough for their money. [556]

BEFORE THE INDIAN CLAIMS COMMISSION

The Sac and Fox Tribe of Indians of Oklahoma, et al.,	Docket No. 158
The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.,	Docket No. 209
The Sac and Fox Tribe of Indians of Oklahoma, et al., *Petitioners,* v. The United States, *Defendant.*	Docket No. 231

Decided: May 12, 1969
(20 Ind. Cl. Comm. 439)

OPINION OF THE COMMISSION

Vance, Chairman delivered opinion of the Commission.

The ultimate issue now before the Commission in this consolidated matter is whether or not the defendant must pay additional compensation to the Sac and Fox and Iowa petitioners for three contiguous tracts of land in eastern Iowa that were ceded to the United States by the Sac and Fox Nation and the Iowa Nation under the Sac and Fox Treaties of September 21, 1832 (7 Stat. 374), September 28, 1836 (7 Stat. 520), and October 21, 1837 (7 Stat. 540) and the Iowa Treaty of October 19, 1838 (7 Stat. 568). The tribal petitioners contend that under their respective cession treaties the United States paid them an unconscionable consideration for lands which they now claim were worth at the time of cession a minimum of $2.50 to $3.00 or more an acre. The Sac and Fox petitioners are also asking the Commission to find separately that the 180,000 acres of reserved mineral lands in and around Dubuque, Iowa, which were included in the overall land cession under the Treaty of 1832, were worth $25.00 per acre for their lead content, and that they should be paid four and one-half million dollars as compensation for their interest therein. The defendant takes sharp issue with the petitioners on all of their value and liability claims.

The three contiguous tracts in eastern Iowa with which we are concerned are Royce Area 175, ceded by the Sac and Fox Nation under the Treaty [440] of 1832, Royce Area 226, ceded by the Sac and Fox Nation under the Treaty of 1836, and Royce Area 244, ceded under the Treaty of 1837. The Treaty of 1838 with the Iowa Nation accomplished a relinquishment of all Iowa interest in these three tracts by way of a general cession to the United States of all lands situated between the Missouri and Mississippi Rivers and the Sioux-Sac and Fox boundary line as established under "Article 2" of the 1825 Prairie des Chein Treaty (7 Stat. 272).

The title questions were substantially resolved earlier in three separate trials.

In Docket No. 158 we previously found that the Sac and Fox Nation was the exclusive owner by virtue of the 1825 Prairie des Chein Treaty of approximately the northern two-thirds of Royce Area 175, and that it enjoyed an undivided one-half interest in the southern third of the tract with the Iowa Nation.[1] We now find that of 5,350,400 acres in Royce Area 175, the Sac and Fox Nation was the exclusive owner of 3,619,200 acres, and the Sac and Fox and Iowa Nations jointly owned the remaining 1,731,200 acres.

In Docket No. 209 the Commission concluded that the Sac and Fox and Iowa Nations each had an undivided one-half interest in Royce Area 226.[2] [441] Royce Area 226

1 *The Sac and Fox Tribe of Indians of Oklahoma, et al.* v. *United States*, 5 Ind. Cl. Comm. 367 (1957)

2 *The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.* v. *United States*, 10 Ind. Cl. Comm. 404 (1962)

was a 400-section tract of land in southeastern Iowa containing 217,600 acres that was reserved from the lands in Royce Area 175 at the time this tract was ceded under the Treaty of 1832.

In Docket No. 231 this Commission previously found that the Sac and Fox Nation and the Iowa Nation had recognized title to the lands in Royce Area 244 and that the extent of their respective interests therein would be the subject of further proceedings.[3] The Commission has now determined that the Sac and Fox Nation exclusively owned the northern two-thirds of Royce Area 244, containing some 792,667 acres, and that the Sac and Fox and Iowa Nations were joint owners of 396,333 acres in the southern third of Royce Area 244.

The Commission's finding that Royce Area 244 contains a total of 1,189,000 acres differs from that acreage figure specified in the Treaty of 1837. In Article 1 of the Treaty, the Sac and Fox cession is described as being one "of a tract containing 1,250,000 (one million two hundred and fifty thousand) acres . . ." but according to the defendant a recent survey of Royce Area 244 indicates only 1,189,000 acres. Petitioners do not actually dispute the accuracy of defendant's survey but they insist that the treaty figure controls. The Commission accepts the defendant's figure as correctly reflecting just what the Sac and Fox Indians parted with under the Treaty of 1837. A blind adherence to the 1837 Treaty acreage figure in this instance would unjustly enrich the Indians at the defendant's expense should the government be compelled to pay additional compensation for some 61,000 acres [442] of land that it never received.

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[3] *The Sac and Fox Tribe of Indians of Oklahoma, et al. v. United States*, 10 Ind. Cl. Comm. 408 (1962)

These three dockets were consolidated for the purpose of trying the issues of value and liability. Extensive hearings were conducted in October of 1962, and an enormous record has been developed. From the mountain of documentary evidence and sworn testimony, the Commission believes that its ultimate conclusions on the issues of value and liability as detailed in its findings of fact are more than amply supported on the record. We shall seek to avoid, as far as possible, any needless repetition of these findings of fact in this opinion.

The expert testimony tendered by the parties was lengthy but informative, and it traveled both novel and traditional avenues in arriving at the proposed fair market values. However, we question the ultimate conclusions reached on both sides.

As stated earlier, the petitioners would have the Commission believe from the record that in the 1833-39 period, a prospective purchaser of the extensive Sac and Fox and Iowa land interests in eastern Iowa, would pay "from $2.50 to $3.00 or more per acre", plus an additional four and one-half million dollars to the Sac and Fox Indians for the lead lands at Dubuque. In contrast to these value figures the defendant suggests that the same evidence indicates fair market values in the range of $0.43 to $0.80 per acre for the same lands inclusive of the value of the Dubuque lead mines.

As of February 9, 1833, the effective date of the Sac and Fox Treaty [443] of 1832, Royce Area 175 was by and large a raw, unsurveyed and unimproved tract of land in eastern Iowa containing over five million acres. As history shows, almost six years will pass before government surveys will have been completed and the first public land sales will have taken place. In 1833 an unknown number of "squatters" were already settled in southeastern Iowa and also around

the Dubuque lead mine region in the northeastern part of Royce Area 175. There was no land market of any sort operating in eastern Iowa, but across the Mississippi River in Illinois and to the south of Royce Area 175 in Missouri there was an enormous quantity of public land still available at $1.25 per acre; a supply far in excess of the demands of new settlement.

Recognizing that this superabundance of nearby public land could only depress and control land values in eastern Iowa during the 1833-39 period the petitioners through their expert witnesses, Drs. Barlowe and Hammer, urged the Commission to adopt their novel "bona fide market" method of valuation.

As explained by Drs. Barlowe and Hammer, a "bona fide market" condition is established when approximately 75% of the public lands in a given area have passed into private ownership. In the case of the eastern Iowa lands this "bona fide market" condition would not be reached until some time in the late 1840's or early 1850's. As we view petitioners' "bona fide market" approach, it simply avoids the consequences of valuing [444] the subject tracts as of the 1833-39 period.[4] We must reject it as unrealistic and contrary to the law.

[4] We find repeated admonitions in petitioners' appraisal report concerning the depressing effect on land values in eastern Iowa that was occasioned by the enormous supply of public land then available both in and around the subject area during the 1833-39 period.

A few examples from Pet.ex.T-4:

> "The abundance of high quality lands still available in areas immediately adjacent to lands already in use was an effective bar to any general upsurge in land values. Indeed the huge acreages of public domain which were on the market and which were being placed on sale provided an obstacle to rising land values over the entire northern Mississippi valley area for decades. (P. 109)
>
> * * * * *
>
> As long as the $1.25 land remained in great abundance, it put an effective ceiling on land prices. * * *

Defendant offered Dr. William G. Murray as its expert witness on the value of the eastern Iowa lands. Dr. Murray testified at some length [445] and was supported in his testimony by an appraisal report which he had prepared. Dr. Murray's "market value" method of appraisal is substantially that which the Commission has adopted in valuing the three subject tracts, and which it has followed in the past when no actual market exists for the lands to be valued either at the time of cession or for sometime thereafter. Dr. Murray laid great stress in his report on contemporaneous government land sales in so-called comparison areas as a prime value factor. His liberal use of such public land sale data is consistent with his view that such evidence constitutes ". . . a fundamental part of this appraisal." The Commission utilized the same data, but we also considered on an equal footing certain other value criteria. We believe that Dr. Murray's ultimate conclusions on value tend to be somewhat on the conservative side.

Indian lands acquired by the United States by purchase or otherwise shall be valued as of the date of their acquisition. *Sac and Fox Tribe of Indians of Oklahoma, et al.*, v. *The United States,* 179 Ct. Cls. 8 (1967). And where, as was the situation with the Sac and Fox petitioners, there was no actual market for land existing in eastern Iowa at the time of cession, then we shall follow the rule laid down originally in the *Otoe Missouria*[5] case and reiterated most

> There is no doubt that so long as any considerable quantity of Government land was available in eastern Iowa for purchase at the minimum $1.25 per acre, it continued to have a depressing effect on land values in that area." (P. 110)

Faced with the rather formidable task of establishing "$2.50 to $3.00 or more per acre" valuations for the subject lands during the 1833-39 period, it seems to us that the petitioners had little recourse but to devise a new appraisal method aimed at negating the "depressing effect on land values" occasioned by this enormous supply of available public land.

[5] *Otoe and Missouria Tribe of Indians* v. *United States*, 131 Ct. Cls. 593 (1955); 177 Ct. Cls. 263; See also *Red Lake Pembina and White Earth Bands* v. *United States*, 164 Ct. Cls. 389 (1964); *Miami Tribe of Oklahoma* v. *United States*, 146 Ct. Cls. 421 (1959).

recently in *Emigrant New York Indian* [446] decision wherein it is stated

> "In the absence of comparable sales and an actual market at the time and place in question, this court has regularly taken into consideration various physical and economic factors in determining the value of lands acquired by the Government from the Indians—elements of value which a willing buyer and seller would have considered in reaching an agreed sale price for the claimed area at the time of acquisition."[6]

Among the physical and environmental factors which the Commission considered in fixing 1833-39 fair market values to the lands in eastern Iowa were the excellent soils and topography; the favorable climate, growing season, and annual rainfall; and, the numerous rivers and streams that insured an adequate water supply and drainage as well as making access and egress into most of the area far less a problem than by overland travel.

Noting that the early Iowa settlers initially preferred lands close to timber, we have found that there were good stands of timber along the water courses. In lieu of timber as a building material there were ample deposits of good quality limestone throughout eastern Iowa. Surface coal could be easily dug and utilized as a wood substitute for fuel. We have considered the presence of lead ore in northeastern Iowa in our separate evaluation of the Dubuque lead mining region.

We have also considered the fact that the population grew rapidly in Iowa during the 1833-39 period, and we could also see that the pattern of new settlement into this region was moving generally north and west, following the Mississippi, Missouri, and other principal rivers. [447]

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6 *United States* v. *Emigrant New York Indian*, et al., 177 Ct. Cl. 263, 285 (1966)

We took note of certain political factors such as the formation of Iowa as a territory including the establishment of both territorial and local government, the creation of courts; and the passage of the 1838 Preemption Act. On the economic level we have considered the general and local business conditions that prevailed, the contemporary farm prices and farm costs including those costs associated with capital improvement, current interest rates, the lack of a sound paper currency and the resultant scarcity of money.

We have looked at the volume and rate of nearby public land sales from about 1820 to the middle 1850's as well as those public sales that began in eastern Iowa in 1838. Throughout the 1833-39 treaty period the price of public land remained at $1.25 per acre in cash.

The private sales data in the record was limited exclusively to those transactions that occurred in the ceded areas beginning from about 1838 through 1856. It included, without distinction, sales and resales of both unimproved and improved land wherein it was impossible to determine separately the value of improvements. The Commission in some detail made a specific finding with respect to those private sales transactions of $5.00 per acre or less in eastern Iowa for the 1839-49 period, and we have found that for this entire ten year period the average private sale or transaction involved only 70.3 acres for which the buyer paid $2.46 per acre.*

Except for the relatively few number of sales that occurred prior to and at the time of the 1838 effective date of the Iowa cession, the [448] bulk of the private sales in eastern Iowa do not qualify as comparable sales, but they do earn some probative value as hindsight or confirmatory evidence. Viewed in this light we fail to see how they confirm petitioners conclusion that in the 1833-39 period the

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* As amended in accordance with order of the Commission entered February 11, 1970 (App. 63).

subject lands in eastern Iowa were worth ". . . $2.50 to $3.00 or more per acre."

Another flaw in petitioners' evaluation approach is the obvious failure to consider the very size of the ceded areas as an appropriate discount factor in estimating their fair market value. These particular Iowa tracts are to be valued as a whole. The Court of Claims had reason in the case of *Nez Perce Tribe of Indians* v. *United States,* 176 Ct. Cls. 815 (1966) to speak directly on this subject. In commenting upon the method followed by the Nez Perce appraiser in valuing the 549,559 acre Nez Perce tract the Court said:

> "Finally, we note regarding Brown's method, that he made no discount for size. We think this is an extremely important feature entering into market value. A purchaser of over one-half million acres simply would not pay what 1000 purchasers of 500 acres each would be willing to pay. . . . It is simply the fact, however, that in buying such a large, undeveloped tract, the government undertook the project of dividing and selling the land. Cf. *Miami Tribe of Oklahoma* v. *United States,* 9 Ind. Cl. Comm. 1, 17 (1960) *aff'd by order 159 Ct. Cl. 593 (1962).* These are expenses the Indians were saved by selling the land as a unit. In addition, by buying the land and holding it pending disposition, the government lost interest on the amount of the purchase price for the period prior to resale. Any purchaser of a large tract necessarily must take account of the interest cost of holding land pending resale. How much of a discount is warranted by the size is difficult to say. . . ."[7] [449]

With the exception of Royce Area 226 which contains 217,400 acres, the other cession areas were in excess of 500,000 acres.

We are also of the opinion that some form of improvement discount is warranted in connection with the use of

[7] 176 Ct. Cl. 824, 825

the private sales data even in the role of confirmatory evidence. When the subject lands were sold in small tracts during the ten year period that followed initial settlement, growth and development of internal improvements alone during that same period gave them increment value. Thus, the birth of new towns and villages, the formation of territorial, county and city government, plus a judicial system, new highway and bridge construction, new schools, etc., all of these public improvements could not help but increase land values.

In light of all these factors as described above, the Commission is satisfied that, consistent with their highest and best use, which was subsistence homestead farming, our per acre value of $0.90 for Royce Area 275 in 1833, exclusive of the value of the Dubuque lead mines, of $1.25 per acre in 1837 for Royce Area 226, of $1.10 for Royce Area 244 in 1838, and finally $1.60 per acre in 1839 for the more than two and a quarter million acres in southeastern Iowa belonging to the Iowa Nation, are amply supported by the evidence of record.

To complete the 1833 evaluation of Royce Area 175 there must be added the fair market value of the Dubuque lead mines in the northeastern part of the tract. For the Dubuque lead mines the Sac and Fox petitioners are asking an additional four and a half million dollars; a figure which we [450] find wholly unsupported in the record.

At the time of the 1832 Sac and Fox Treaty, the United States reserved from public sale roughly 180,000 acres in the Dubuque area. These lands the Government had classified as mineral bearing on the basis of reports of high lead content and possibly out of an abundance of caution because there were and had been for years valuable lead deposits at Dubuque.

We think the Sac and Fox petitioners have based their four and a half million dollar estimate on two somewhat specious assumptions; one, that in 1833 the entire 180,000 acres of reserved mineral lands around Dubuque contained commercially profitable lead bearing ore, and secondly, that the record of mineral lot sales or "claims" occurring around Dubuque between 1836 and 1850 at an average price of roughly $25.00 per acre are the best evidence of the value of the mineral content of the reserved lands.

First of all, the evaluation of lead mining operations such as existed around Dubuque is not an acre by acre proposition. The value of a particular lead mine in most instances has no genuine relationship to the size of the tract upon which it might be located or the extent of the area surrounding it. There are several examples in the record of commercially valuable lead mines being worked in their entirety within the confines of a few hundred square yards or even less.

Secondly, the prices realized in the trafficking in mineral "claims" around Dubuque in the 1836-1850 period are not a sound basis for valuing the mineral content of land. [451]

In the case of *The Tlingit and Haida Indians of Alaska* v. *United States,* 182 Ct. Cls. 130 (1968), the Court of Claims, in as few words as possible, clearly enunciated the criteria which should be fcllowed in valuing mineral lands: (P. 148)

> "•••Mineral value is established by adequate proof of a fair market value indicating that removal of the deposit would be a profitable venture and would not involve exorbitant expense.
>
> Proof either of actual profits from an existing mine or of prospective profits from a potential mineral area establishes the mineral value of the area.•••"

And with respect to such speculative ventures as purchasing "claims" as evidence of mineral value the Court went on to say: (P. 149)

> "Plaintiffs have offered proof of recorded sales of the mineral interests as speculations. This proves only the value of the property as a speculation but does not establish the value of the mineral. The supply and demand for a speculative property does not establish the value of the mineral. The fair market value of a speculation does not enhance the value of the land or the value of a mineral deposit. The purchase of a right to explore does not prove the value of the minerals which the purchaser believes to be present in the land."

The Commission has attempted to value the lead operations at Dubuque in line with criteria set forth in the *Tlingit* case. However, certain evidentiary facts relative to capitalization expenditures were not available in the record and the absence of such information actually accrued to the benefit of the Sac and Fox petitioners in our final value estimate. We did have evidence of the fact that the prevailing market price of lead remained at a fairly stable $0.04 per lb. in 1833 and for several years thereafter. We nave also found that the lead production costs worked out to [452] approximately $0.025 per lb., and these included such items as the labor costs for digging and smelting, and transportation costs. Absent evidence of the cost of capital outlay, including any additional capital needed to attain the Sac and Fox petitioners' projected annual production figure of 3,000,000 pounds of lead, we have determined an operating profit of $0.015 per lb., or a projected annual return of $45,000.

Knowing that any mining venture includes distinct elements of risk, and that 20 years is a reasonable estimate of the productive life of an operating lead mine, a prudent investor in our judgment would expect a minimum profit

return of 15% on his investment, plus a 5% rate of redemption of his capital over the life of the operation. On this basis the prudent and knowledgeable purchaser of Royce Area 175 would not invest more than an additional $240,000, which figure we believe fairly represents the 1833 market value of the Dubuque lead mining area.

Having established treaty market values for the ceded areas, the question now is the adequacy of the respective treaty considerations that the United States had agreed to pay to the Sac and Fox and the Iowa Indians for their lands. Except for the Sac and Fox cession of Royce Area 226 under the Treaty of 1836 for which these Indians received more than full value, the government paid a grossly inadequate price to the Sac and Fox Nation under the 1832 and 1837 treaties for Royce Areas 175 and 244, and to the Iowa Nation under the Treaty of 1838 for its interest in the eastern [453] Iowa lands.

Although the defendant is liable to these petitioners for the payment of additional compensation for the loss of their eastern Iowa lands, the Commission does not agree with all of the petitioners' conclusions relative to the value of the treaty considerations. Our differences are slight with the Iowa petitioners in regard to the 1838 treaty, but not so with the Sac and Fox petitioners who apparently have ignored binding principles of law as well as pertinent treaty provisions in seeking to maintain minimum values for the 1832 and 1836 treaty considerations.

Under Article 1 of the 1832 Sac and Fox Treaty, the United States agreed to pay to the Sac and Fox Nations annually for 30 years the sum of $20,000 in specie, or a total of $600,000. The Sac and Fox petitioners would have us commute this figure on the basis that it is a deferred payment of consideration over 30 years, the actual cash

value computed at 5% interest as of the date of the treaty being $317,499, a difference of $282,551.

In Docket No. 10, *The Pawnee Indian Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 82, the Commission, following the rule of the Court of Claims as set forth in the case of *Miami Tribe of Oklahoma* v. *United States*, 150 Ct. Cl. 725 (1960) and *Crow Tribe of Indians* v. *United States*, 151 Ct. Cl. 281 (1960), commuted a deferred payment arrangement of the treaty consideration (not amounting to a perpetual annuity) in the identical manner contended for by the Sac and Fox petitioners herein. On appeal [454] the Court of Claims reversed, admitted there was error in the earlier *Miami* and *Crow* decisions, and then stated among other things:

> "It now seems evident to us that this is tantamount to charging the United States with interest—in face of the well established rule that the United States is not liable for interest in absence of a contractual or statutory requirement to pay interest . . .
>
> "We are of the opinion that the defendant is entitled to credit for the full amount paid, although paid over a period of years."[8]

The Commission has credited the defendant with the entire $600,000, as well as certain other items that are set forth as consideration under the Treaty of 1832. We have done so in light of the *Pawnee* decision, but with the feeling that our actions are in some measure inconsistent with what normally would have been expected in handling this annuity arrangement. Contrary to the situation that confronted the Court of Claims in the *Pawnee* case, the payment herein to the Sac and Fox Indians under Article III of the Treaty of 1832 "annually, for thirty successive years, . . . the sum of

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[8] *Pawnee Tribe of Oklahoma* v. *United States*, 157 Ct. Cl. 134, 138, 139 (1962)

Twenty Thousand in specie," allows the defendant to realize as an offset a greater value in this limited annuity than had the treaty called for payment of a perpetual annuity of $20,000.

In the *Pawnee* case, the Court of Claims in considering what credit the United States was entitled to for payments made to the Pawnee Indians [455] on account of a $30,000 perpetual annuity, limited the offset value of said annuity to its commuted value, that is, an amount which, if invested at 5% interest, would have produced the yearly payment required under the Pawnee treaty. In the instant case the limited Sac and Fox $20,000 annuity ran for thirty years. Thus, the defendant is permitted to offset some $200,000 more than the value of the principal sum that would have been needed, if invested at 5% interest, to produce $20,000 annually *ad infinitum.*

The Sac and Fox petitioners also discounted a part of the 1836 Sac and Fox treaty consideration involving the cession of Royce Area 226. The Commission found the 1836 Sac and Fox treaty consideration to be $192,000.12, but the Sac and Fox petitioners say it was worth only $140,417.00. The $51,583.12 difference can be attributed, for the most part, to the Sac and Fox petitioners discounting $100,000 which the United States under Article 2 of the 1836 treaty had agreed to pay to the Sac and Fox Nation over a ten year period. With an 1837 fair market value of $1.25 per acre, the Sac and Fox one-half interest in the 217,600 acres in Royce Area 226 was worth only $136,000. Accepting the Sac and Fox petitioners' estimate of the value of the 1836 treaty consideration, the Sac and Fox Indians received full value for their one-half interest, and under the Commission's consideration figure they received more than full value.

In summation the Sac and Fox and the Iowa petitioners are entitled to recover from the defendant additional compensation for the relinquishment [456] of their lands in eastern Iowa in the amounts as set forth in Commission findings 45, 51 and 53. Since the defendant is not liable to the Sac and Fox petitioners for additional compensation for the cession of Royce Area 226 under the Treaty of September 28, 1836, this particular claim in Docket No. 209 will be dismissed.

All offsets applicable to the Sac and Fox and Iowa awards in these dockets have either been settled and set off under previous orders of the Commission or waived by the defendant.[9] Therefore, the several judgments entered in Docket Nos. 158, 209, and 231 are final in all respects.

John T. Vance, *Chairman*

We concur:

Jerome K. Kuykendall, *Commissioner*

Richard W. Yarborough, *Commissioner*

Margaret H. Pierce, *Commissioner*

(Commissioner Blue did not participate in the consideration or decision in this case.)

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[9] Docket Nos. 138 and 232, *The Iowa Tribe, et al.* v. *United States*, 15 Ind. Cl. Comm. 42, Docket No. 135, *The Iowa Tribe, et al.* v. *United States*, 15 Ind. Cl. Comm. 248, Defendant's "Motion to Remove Hearing on Offsets from Trial Calendar", March 5, 1969. [457]

BEFORE THE INDIAN CLAIMS COMMISSION

The Sac and Fox Tribe of Indians of Oklahoma, et al.,	Docket No. 158
The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.,	Docket No. 209
The Sac and Fox Tribe of Indians of Oklahoma, et al., *Petitioners,* v. The United States, *Defendant.*	Docket No. 231

Decided: May 12, 1969
(20 Ind. Cl. Comm. 439)

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. The tribal petitioners herein who are the successors in interest to the Sac and Fox Nation (also known as the "Confederated Sac and Fox") are the Sac and Fox Tribe of Indians of Oklahoma, the Sac and Fox Tribe of Missouri, and the Sac and Fox Tribe of the Mississippi in Iowa. The tribal petitioners herein, who are the successors in interest to the Iowa Nation of Indians, are the Iowa Tribe of the Iowa Reservation in Kansas and Nebraska and the Iowa Tribe of the Iowa Reservation in Oklahoma. Certain individual members of the several tribal petitioners have brought these suits as representatives of and on behalf of the Sac and Fox and Iowa Nations and all of their members.

On August 2, 1957 in Docket No. 158, (5 Ind. Cl. Comm. 367) and on [458] June 1, 1962 in Docket No. 209 (10 Ind. Cl. Comm. 404) and Docket No. 231 (10 Ind. Cl. Comm. 408), this Commission entered interlocutory orders concerning the subject lands involved in this proceeding wherein it was determined that the Iowa tribal petitioners and the Sac and Fox tribal petitioners had the right and capacity under the Indian Claims Commission Act to bring and maintain these proceedings as the successor in interest to those Indians who owned the subject lands ceded under the Treaties of September 21, 1832 (7 Stat. 374), September 28, 1836 (7 Stat. 520), October 21, 1837 (7 Stat. 540), and October 19, 1838 (7 Stat. 568).

2. The subject lands to be valued herein are three contiguous tracts in eastern Iowa which together form one large area of land aggregating 6,757,000 acres. Officially they are identified as Royce Areas 175, 226 and 244.

3. The Sac and Fox Nation ceded its interest in the lands designated as Royce's Cession 175 by a treaty concluded on September 21, 1832 (7 Stat. 374), herein called the Treaty of 1832, which became effective on February 9, 1833, the date of its ratification by the United States Senate. The Iowa Nation ceded its interest in Cession 175 by a treaty concluded October 19, 1838 (7 Stat. 568), herein called the Treaty of 1838, which became effective on February 28, 1839. The Commission has previously found in Docket No. 158, *supra* that the Sac and Fox Nation was the exclusive owner of the lands in Cession 175 lying north of a line extending from the point where the western boundary of Cession 175 crosses the Red Cedar River to a point [459] on the Mississippi River five miles northeast of Muscatine, Iowa. This part of Cession 175 contains 3,619,200 acres. The Commission also determined that the Iowa and Sac and Fox Nations jointly owned the lands in Cession 175 lying southerly of the above described line, and that their interests therein were equal. This part of Cession 175 contains 1,731,200 acres. Cession 175 has a total area of 5,350,400 acres.

4. The lands designated as Royce Cession 226 consist of 400 sections—or 217,600 acres—in southeast Iowa.

Cession 226 was reserved from the lands ceded by the Treaty of 1832 and is an enclave surrounded on three sides by the boundaries of Cession 175. The Sac and Fox Nation ceded its interest in Cession 226 by the Treaty of September 28, 1836 (7 Stat. 520), herein called the Treaty of 1836, which treaty became effective on October 13, 1837. The Iowa Nation ceded its interest in Cession 226 by the Treaty of 1838 referred to in Finding 1. The Commission has heretofore found that the Sac and Fox Nation and the Iowa Nation each owned an undivided one-half interest in Cession 226. (10 Ind. Cl. Comm. 404, 407 (1962)).

5. The lands designated as Royce Cession 244 were ceded by the Sac and Fox Nation to the United States under the Treaty of October 21, 1837, (7 Stat. 540), herein called the Treaty of 1837, which treaty became effective on February 16, 1838, and by the Iowa Nation under the Treaty of 1838 referred to in Finding 1.

The Commission has heretofore found in Dockets 158, *supra* and 209, *supra* that the Sac and Fox Nation and the Iowa Nation jointly used and owned in equal part lands in Iowa to the east of Cession 244. For a number of years commencing around the 1770's, the Iowa Nation had a village at or in the vicinity of present Selma, Iowa, and therefore in or immediately east of the [460] southern part of Cession 244. While their village was located at this place Iowa Nation used the lands in approximately the southern one-third of Cession 244 as well as lands in Iowa to the east of those lands for hunting purposes. As the Commission has heretofore found in Docket 158, *supra* the Sac and Fox Nation had villages along the Mississippi River in the

area in southeastern Iowa which it jointly used with the Iowa Nation. Residents of those villages as well as other members of the Sac and Fox Nation hunted and otherwise used lands in Iowa to the west of those villages.

We find that the Sac and Fox Nation exclusively owned the north part of Cession 244, comprising two-thirds of its total area, and that the Iowa Nation and the Sac and Fox Nation each owned an undivided one-half interest in the balance of Cession 244. This finding is supported by the evidence and is consistent with the findings which the Commission has made concerning the ownership of Cession 175 in Docket 158 and Cession 226 in Docket 209. The finding is also consistent with the position taken by counsel for the Sac and Fox and Iowa in this proceeding and is in accordance with the stipulation executed on behalf of both tribes.

6. The Treaty of 1837 fixes the acreage of Royce Area 244 at 1,250,000 acres. Recent figures submitted by the Bureau of Land Management, the accuracy of said figures not being controverted, show that the boundaries of Royce Area 244 contain 1,139,000 acres. The Commission therefore accepts the latter figure as correctly reflecting the total area actually ceded to the United States under the Treaty of 1837. The northern two-thirds of Cession 244, which was exclusively owned by the Sac and Fox Nation, contains 792,667 acres. The southern one-third of Cession 244 comprises [461] 396,333 acres of which the Iowa and Sac and Fox each owned an undivided one-half interest.

7. The Sac and Fox interest in Cession 175 shall be valued as of February 9, 1833, in Cession 226 as of October 13, 1837, and in Cession 244 as of February 16, 1838. The interest of the Iowa Nation in all three cessions shall be valued as of February 28, 1839, which is the effective date of the Treaty of 1838.

8. The acreage of Royce Cessions 175, 226 and 244 includes all or part of the following present-day Iowa counties:

Allamakee	Jackson	Scott
Clayton	Iowa	Jefferson
Fayette	Johnson	Henry
Buchanan	Cedar	Des Moines
Delaware	Clinton	Davis
Dubuque	Keokuk	Van Buren
Benton	Washington	Lee
Linn	Louisa	Jones
Muscatine		

9. For the most part the climate of eastern Iowa is ideal from both the point of view of the health of its inhabitants and for the formation of its soils. The average annual temperature is about 50° F. and in the summer months is about 70° to 75°; rainfall is highest in the eastern part of the state, averaging about 32 to 36 inches per year. Most of it falls in the crop growing season which varies from 150 to 170 days between May and October. At times there are periods in which there is experienced hot winds and prolonged high temperatures that cause major crop damage. The climate of the State of Iowa has been the same for the past 5,000 years and this constancy of weather has contributed to the general excellence of the Iowa soils. [462]

10. The Mississippi River forms the eastern boundary of the cession lands and into it flow six of Iowa's medium-sized rivers that provide ideal natural drainage. From the south to the north those rivers are: The Des Moines River in the extreme southern portion; the Skunk River that forms the border of Lee and Des Moines Counties; the Cedar River that is the confluence of the Red Cedar River and the Iowa River; the Wapsipinicon that empties into the Mississippi between the present cities of Davenport

and Clinton; the Maquoketa, between the cities of Clinton and Dubuque; and the Turkey that reaches the Mississippi approximately 30 miles north of Dubuque.

The early settlers and observers noted that very little of the three cession areas was subject to flood and that the country was generally high, dry, and rolling, but not so rolling as to render the lands unfit for cultivation. In general, there were no large swamps or broken wastelands.

11. Roughly 80% of the three cession areas is level to moderately sloping land. This kind of topography is desirable for agricultural purposes. Most of the eastern Iowa lands are sufficiently sloping as to provide good natural drainage through the streams and tributaries previously referred to. However it can be stated that about 15 to 20 percent of the land in the three cession areas can be classified as being somewhat wet or poorly drained. Where not subject to serious erosion the sloping lands in eastern Iowa were cultivated without too much difficulty.

12. An optimum combination of environmental factors in the cession lands—climate, parent materials, natural vegetation, topography, natural [463] drainage, and geologic time—produced soils of unusual fertility. Ninety-eight percent of the parent material of the cession lands soils consisted of loess, glacial drift, and alluvium, which are ideal for growing both native prairie grasses and grain crops.

Practically the entire subject area is made up of soil associations in either the prairie-formed or forest-formed soil group. The remainder consisted of bottom land area along the Mississippi River. The prairie-formed and forest-formed soils were quite intermixed in the cession lands and both types are found on many farms. The prairie-formed soils are superior in both fertility and natural drainage; forest-formed soils are only slightly less desirable

and the bottom lands, although often highly productive, are sometimes poorly drained.

13. The inherent fertility of the Iowa soils is an important consideration in the early capability of Iowa land to grow seed grain crops and vegetables. The Iowa yields in the early period reflect the inherently high fertility status of these soils. The early eastern Iowa settlers grew wheat, corn, rye, barley, buckwheat, oats, and clover. All kinds of vegetables and fruits were also raised including potatoes, melons, pumpkins, onions, beets, turnips, parsnips, rutabaga, grapes, strawberries, gooseberries, plums and apples.

Per acre crop yields reported by early settlers ranged as follows: Corn, 40 to 100 bushels; wheat, 25 to 40 bushels; barley, 50 bushels; clover, 80 bushels; oats, 60 to 110 bushels; and buckwheat, 20 to 30 bushels. Wheat when sowed in newly-turned prairie sod would usually [464] produce 30 bushels to the acre. Yields of 400 to 500 bushels of potatoes and onions per acre were realized.

Apart from food growing activities, edible fish could be readily taken from the many streams, sugar obtained from the sugar maple, and there seemed to be a plentiful supply of small game and wild fowl.

14. The prairie grasses provided excellent natural grazing and large quantities of hay. A variety of peas which grew in some of the river bottoms also provided excellent fodder. The early settlers used these resources in raising their beef and dairy cattle, sheep and swine.

Small streams and springs provided ample water for human and stock consumption. Wells, while not often necessary, could easily be dug.

15. For the most part adequate quantities of timber suitable for the needs of the early settler were found throughout the three cession areas. White oak, black oak,

sugar, maple, ash, elm, black walnut, hickory, ironwood, lynn [linden], hackberry, butternut, cedar, and poplar were among the kinds of trees. The farms which were located entirely in the prairie were seldom more than two or three miles away from timber which was not necessarily a burdensome distance for the early settler. Moreover, new timber grew easily and rapidly in eastern Iowa. However, the Commission finds that in the initial selection of lands in eastern Iowa, settlers showed a preference for the land near the water courses and near timber.

16. There were a large number of mill sites in the three cession areas. Some mills were already in existence in 1836 when the government surveys of Cession 175 commenced. The detailed notes of the surveys refer [465] to more than 125 mill sites in these lands. The mills were used to saw lumber, grind grain for flour and meal and to provide power for other mechanical purposes.

The abundant water power available throughout the three cession areas was an important feature of those lands. Near-at-hand mills enabled the early settler conveniently to satisfy his own needs for, and to convert his surplus agricultural crops into, milled products.

17. Building stone was readily available to the early settlers throughout the cession areas. There was an abundance of limestone of an unusual fine quality throughout. Detailed notes made from Government surveys during this early period refer to the presence of coal in each of the cession areas. Some coal was mined in eastern Iowa in 1835 for sale to steamboats using the Mississippi River and in 1838 for sale to the inhabitants of Davenport and Rockingham. However, during the treaty periods involved herein coal production was not of any substantial commercial value, its use being generally restricted to local consumption as a fuel substitute for wood and to the activities of the village blacksmith. During this same period

the presence of zinc and iron ore deposits were of no commercial value. Zinc production did not become an economic factor until nearly 1860, there being no existing market prior to that time.

18. The three cession areas were readily accessible to new settlement in the 1830's. The mainstream of new settlement into the middle west during this period flowed in the general direction and with the courses of the principal navigable rivers and streams, the Ohio, Mississippi, Missouri and [466] Illinois. These waterways provided the best means of transportation and the pioneer settlers located along them because they did furnish optimum accessibility to the land.

In and prior to the 1830's, the main routes to Iowa were from Pittsburgh down the Ohio River and thence up the Mississippi River, or from New Orleans north on the latter river. In addition, boats cruised on the Great Lakes from Buffalo to Green Bay and from Green Bay there was a water route to the Mississippi River by way of the Fox and Wisconsin Rivers. Buffalo could be reached from New York by way of the Hudson River and the Erie Canal. Great Lakes steamers also served Milwaukee and Chicago and there were overland stage routes leading from those places to Iowa. The Cumberland Road, from Cumberland, Maryland to Columbus, and the Mississippi River were also available. By 1830 there was considerable steamship traffic on the Mississippi River. With the settlement of eastern Iowa, this traffic expanded rapidly.

From at least 1833 there were ferries operating on the Mississippi between Iowa and Illinois. By 1846 ferries were authorized at all the leading towns along the Mississippi.

The Cedar, the Iowa, the Skunk and the Des Moines Rivers were all used by early settlers for the movement of goods and produce and other transportation purposes

within the three cession areas. The Turkey, Maquoketa and Wapsipinicon Rivers were not used to the same extent as the four streams first mentioned.

Overland travel in the cession lands in the early 1830's presented some problems. The almost total absence of public roads and bridges [467] during the first years of settlement made travel by ox teams and wagon very difficult. In rainy weather travel was nearly impossible and very dangerous. As eastern Iowa became more settled, roads were laid out and established. Railroads contributed nothing to the transportation situation in Iowa during the 1830's since the first railroad did not reach the Mississippi from the east until 1854.

19. In 1833, the year in which the Sac and Fox interest in Royce Area 175 had been effectively extinguished, none of the lands in Iowa had been surveyed or officially opened for public sale or settlement. Although it was illegal to do so, thousands of settlers entered Iowa between 1833 and 1838 when the first public sales took place. These settlers or "squatters" established farms, and villages, and towns were laid out at Dubuque, Davenport, Burlington, Fort Madison, and other places.

Early settlers also moved into Royce Area 226 and Royce Area 244, some of them prior to the treaty cession dates and before the lands had been surveyed and offered for sale.

The United States recognized that settlement was taking place in eastern Iowa although no provision had been made for the sale of public lands before 1838. Iowa was added to the Territory of Michigan in June of 1834, and was subsequently transferred to the new territory of Wisconsin in April of 1836. A session of the Wisconsin Territorial Legislature was held at Burlington, Iowa, in November,

1837, and in June, 1838, the Iowa Territory was created. Courts were established and Des Moines and Dubuque counties were organized in 1834 in advance of the surveys. By 1839 there [468] were 19 counties substantially within the overall three cession area.

20. In 1836, the Congress appropriated $30,000 for land surveys to begin in Royce Area 175. Surveys were not completed until 1838, at which time the surveyed area was divided into two land districts. Burlington and Dubuque, each on the Mississippi River, were designated respectively as the sale headquarters for the southern district and the northern district. The Burlington or southern district accounts for approximately one-third of the overall three cession area, while the Dubuque or northern district takes care of the remaining two-thirds.

In June 1838 the Congress enacted a Pre-emption Law that granted the early settlers or "squatters" who had settled in Iowa before February 22, 1838, and who were living there on June 22, 1838, a right to buy their quarter sections within two years without competition, at the prevailing government price of $1.25 per acre. The filing of pre-emption claims commenced on September 23, 1838, at Dubuque and on October 1, 1838, at Burlington. Auctions of the public lands at $1.25 per acre minimum price started at Dubuque on November 5, 1838, and at Burlington on November 19, 1838.

21. At the time of the first public sales of land in eastern Iowa in 1838, the Iowa population had been officially recorded at 22,859. This is more than double the 10,531 figure recorded for the year 1836. [469]

Of the 22,859 persons recorded under the 1838 census, some 13,676 of them or about 60 percent of the total population were living in the four southernmost counties of Des

Moines, Henry, Lee, and Van Buren, which counties formed a contiguous area situated between the broad general confluence of the Mississippi River and the Des Moines River. After these four counties, the next most populous county in 1838 was Dubuque, the lead mining center, with 2,835 people.

22. Relevant population data with respect to the adjoining Illinois and Missouri areas to the east and south of the subject lands shows that in 1810 there was an increase in population along the Ohio River and a movement up the Mississippi River from the Ohio River to St. Louis. North of St. Louis there were no settlements of a density of two or more inhabitants per square mile. During this period the largest population nearest to the subject lands in eastern Iowa was concentrated close to the Mississippi River at St. Louis and to the south of St. Louis. By 1820 settlement had expanded along the Ohio and Mississippi rivers and later from St. Louis northward near the confluence of the Des Moines River just below Royce Area 175, and contemporaneously westward along both sides of the Missouri River. The 1820 census shows that some 30,185 people were living north of the Missouri River in the State of Missouri in those counties bordering the Mississippi River. The most sizeable population in 1820 west of St. Louis along the Missouri River was at Boone's Lick in the Missouri River Valley. By 1830 the westward [470] flow of settlers along the Missouri River had reached the Missouri borders with a large population located at present-day Kansas City.

In Illinois the 1830 census showed that 75,973 people were living in the northern two-thirds of the State as against some 17,412 people recorded under the 1820 census. In the northwest corner of Illinois there was a settlement near Galena. Galena, Illinois, on the east side of the Mississippi

is in the same Upper Mississippi Valley lead mining region as is Dubuque, Iowa.

The population patterns for the Missouri-Illinois areas south and east of the subject lands between 1810 and 1830 show a definite expansion movement along the major river courses.

23. During the six year interval between the 1832 Sac and Fox cession of Royce Area 175 and the first sales of public lands in 1838, many thousands of settlers had illegally entered eastern Iowa, settled there, and made valuable improvements on their lands. Acceding to the many requests of the territorial legislature, Congress finally enacted a pre-emption law aimed at protecting the land claims of these "squatters". By its preferential treatment, the 1838 Pre-emption Law allowed those persons, who had actually settled in Iowa before February 22, 1838 and had continued living on their lands until June 22, 1838, first call to their lands at the prevailing $1.25 per acre cash price.

Also operating in eastern Iowa, prior to the first public land sales [471] were the so-called "claims" clubs. These clubs or associations were organized by "squatters" for their mutual protection. Members of the club agreed to respect the land claims of their fellow members by not entering bids at the public sale. By eliminating or discouraging competitive bidding club members could normally be assured that they would only have to pay the minimum $1.25 Government price in order to purchase the lands upon which they had illegally settled. However, the role of these "claims" clubs in preventing competitive bidding at public land sales can be overemphasized since in actual practice many settlers did not need this service because of the preferential rights gained under the 1838 pre-emption law. Indeed the record herein is devoid of any substantial evi-

dence upon which the Commission can draw valid conclusions as to overall effect of "claims" clubs' operations upon both public and private land sales in and during the late 1830's and 1840's.

24. At the time of the first public land sales in eastern Iowa in 1838, a sizeable quantity of competitive public land had been on the market in neighboring Illinois and in northern Missouri. In northeastern Missouri, an area just south of and adjoining Royce Area 175, some 713,509 acres of public land was still available for sale in 1833. Public lands in northeastern Missouri had been offered for sale between 1819 and 1831 with most of the townships being offered in 1823. In the northwestern part of Missouri near the site of present-day Kansas City, some 292,712 [472] acres of public land were still available for sale in 1833. This whole area had been first offered for public sale in 1821.

On the east side of the Mississippi River in Illinois, and adjacent to its confluence with the Rock River, some 169,210 acres of public lands were offered for sale in 1829. In 1833 some 166,447 acres were still available. At this time the Rock Island area in Illinois was somewhat north of existing settlements and this accounts for the lack of any serious demand for these lands in the first sale years.

25. During the period relevant to evaluation of the three cession areas, namely 1833 to 1839, the prevailing price for government lands remained at a cash price of $1.25 per acre. This price had emerged as a compromise between those members of Congress who believed that the Government should sell lands as a prime revenue raising measure, and those who believed that public lands should be turned over to the settlers free of charge or at a nominal price.

The Government price of $1.25 per acre was the same for the finest lands and for the worst lands. Between 1833 and

1839 the Government continued to offer millions of acres of public lands at a $1.25 per acre notwithstanding the fact that prospective purchasers were not numerous enough to buy more than a fraction of the amount of land being offered. In 1834 the quantity of surveyed and unsold land was 104,000,000 acres. Settlers were not likely to and did not usually pay more than the minimum price for land in purchasing from the Government in view of the millions of acres available throughout the United States at that price. [473]

The superabundance of available public lands at the uniform $1.25 per acre price situated immediately adjacent to and within the three cession areas during the years 1833 through 1839 was an effective bar to any upsurge in land values in eastern Iowa for many years to come. In fact, the enormous glut of public land on the market during this period depressed land values over the entire northern Mississippi valley area for decades.

26. The record of public land sales in eastern Iowa within the three cession areas shows that the available lands in Royce Area 175 and Royce Area 226 were first offered for sale in 1838. Public land sales in Royce Area 244 did not commence until 1843.

With the bulk of the 1838 population concentrated in the southeastern part of Iowa, the volume of public land sales handled by the Burlington land office far outstripped those recorded by the Dubuque land office. The four most populous counties in the Burlington land district in 1838 were within that area the Commission has identified in Finding 3 supra, as Royce Area 175 south, which also includes Royce Area 226.

In the Burlington land district over 50% of the lands that were offered for sale in 1838 and 1839, the initial sale years, were sold by 1840. By 1842 some 1,629,680 acres of land in

the Burlington land district had been proclaimed for sale and over 62% had been sold. The initial burst of sales must be attributed to the fact that out of the 16,386 persons in the Burlington land district, there were a large number of resident "squatters" who were now availing themselves of their pre-emptive right [474] of purchasing the claims upon which they had been living at $1.25 per acre free of any competitive bidding.

In the early 1840's an economic depression put a damper on land sales. Thus it appears that in Royce Area 175, south, and in Royce Area 226, one-half of all the public lands reached private hands within the years 1838 to 1840, inclusive, while it took from 1841 to 1855 to dispose of the remainder with the three high years of sales occurring in the 1851-53 period.

In the northern or upper part of Royce Area 175 within the Dubuque land district, public lands did not sell as rapidly as those in the Burlington land district. Most of the 1838-1840 population in northeastern Iowa was in the Dubuque lead mining area. Some 180,000 acres of lands in the Dubuque area were classified as mineral bearing by the Government, and had been withheld from public sale until 1847. This lack of any sizeable population near the first public land offerings in Dubuque land district in 1838-1840 was the real reason that there was no genuine demand for these lands. The public land offerings in northeastern Iowa, besides being somewhat remote from the existing settlement areas, were not directly in the path of the general movement of new settlement.

By 1842 nearly 2,381,760 acres had been proclaimed for sale in the Dubuque district of which 239,969 acres or 10.0% were sold. By 1845, some 4,012,720 acres had been proclaimed for sale, of which 473,430 acres had been sold. [475]

Included in the latter figures was some land in Royce Cession 244. Most of the townships in those counties within Royce Area 244 were offered for public sale in 1843, but those along the western border with the exception of one township were offered in 1845-1847. By 1855 practically all the public lands available in Royce Area 244 had been sold.

Most of the lands in the three cession areas were sold for cash. All of the land was sold at a price of $1.25 per acre or within a penny of that amount. The cost to the Government of surveying the public lands in the three cession area prior to sale was approximately 6.2 cents per acre.

27. Contemporaneous with the sale of public lands within the three cession area that began in the years 1838, 1839, there were recorded the first private land sales. There has been reproduced and placed in evidence a compilation of some 13,600 private land transactions of $5.00 per acre or less taken off the land record books of the nineteen counties within the three cession area.* These nineteen counties are: Buchanan, Cedar, Clayton, Clinton, Delaware, Des Moines, Dubuque, Henry, Jackson, Jefferson, Johnson, Jones, Lee, Linn, Louisa, Muscatine, Scott, Van Buren, and Washington.

There was a steady volume of private sales following public entry during the ten year period 1839-1849. On the whole resale prices were at a higher level in the southern part of the three cession area than in [476] the northern part. An analysis of this private sales data, which includes a conglomerate of improved, unimproved land, and resales, shows the following average price per acre within the then three cession areas and for the total area during this 1839-1849 period.

In Royce Area 175 south some 448,543 acres were sold for $1,197,375.00, or at an average price of $2.67 per acre. Some

* As amended in accordance with order of the Commission entered February 11, 1970 (App. 62).

5,850 transactions were involved. Based on the total acreage sold during this period the average transaction works out to 76.7 acres per sale.

In Royce Area 175 north 200,593 acres were sold for $4,033,017.00 or at an average price of $2.16 per acre. There were 3,011 transactions recorded in this period with the average transaction based on total acreage sold, being 66.6 acres.

In Royce Area 226 there were 47,096 acres sold for $134,463.00 or at an average price of $2.86 per acre. There were 638 transactions with the average transaction based on total acreage sold being 73.8 acres.

In Royce Area 244 a total of 263,214 acres were sold for $594,523.00 or at an average price of $2.26 per acre. Some 4,161 transactions were involved with the average transaction being 63.3 acres.

From the record of the above private land transactions it is not possible to determine the amount of improved land that was involved, the actual value of any such improvements, the number of resales, or the number of credit transactions.

Totaling up all the private sales transactions of $5.00 per acre or less in the three cession area during the 1839-1849 period the Commission finds that 959,446 acres [477] were sold for $2,359,378.00 or at an average price of $2.46 per acre, and that the average transaction was 70.3 acres.*

There is evidence that during the 1839-49 period some sixty-two grantors sold 1000 or more acres in the three cession areas aggregating 144,662 acres for an average consideration of $2.63 per acre. However, there were no significant large scale transactions of a speculative nature that would appreciably affect the overall private land sale

* As amended in accordance with order of the Commission entered February 11, 1970 (App. 63).

market during this period. Since 70.2 acres represents the size of the average transaction throughout the entire three cession area during this 1839-49 period, the vast majority of settlers in eastern Iowa were purchasing at private sale only that quantity of land sufficient to satisfy their own immediate needs. The prevailing $2.46 per acre average price paid for *all* types of land at private sale throughout the three cession area during the 1839-1849 post cession period is a clear indication that the available supply of Government land in eastern Iowa at $1.25 per acre during this same period was large enough to be an effective depressant to any general upward movement in land prices.

28. The cost of improving raw virgin land in eastern Iowa in 1833 as well as during this 1837-39 period was a considerable expense that the settler had to face. Besides the initial $1.25 per acre purchase price, the new settler either had to improve his land through his own labor or pay others to do it. The initial improvements to the land generally [478] involved fencing, breaking the sod, and constructing the necessary buildings. The charges for breaking prairie ranged between $1.50 to $2.50 per acre and fencing costs were quoted at $1.00 per acre. A rudely made double log cabin cost $75.00 in 1844. In 1849 a four room frame house would cost $294.50 and a brick house of the same size $325.00. Farm costs would vary according to size of the tract, and to the extent to which the settlers used their own labor or contracted it out. It was estimated in 1844 that a settler could acquire and begin operating an 80 acre farm with an initial investment of $400.00 in land, animals, farming equipment, buildings, seed and living expenses.

Besides improvements actually made to the land, the presence of and the continuous development of public improvements added indeterminable value to all land subject

to sale. During the 1839-49 post cession period eastern Iowa had witnessed the organization of county and local government, growth of towns, the building of bridges, roads, and schools.

29. Within the interval covered by the cession dates, 1833 to 1839, business conditions were generally favorable with the exception of the years 1837-1838 when there was experienced periods of recession and depression. Interest rates on government bonds remained at the 6% level. Short term commercial interest rates were in the 6 to 9 per cent range, and any prospective buyer or buyers of the three cession areas would have to pay minimum interest rates between 7 and 8 per cent for purchase money. [479]

Individual settlers borrowing money for their land purchases were facing interest rates of from 10 to 40 per cent from private lenders.

As was the case in most frontier settlements, hard money was scarce in the 1830's. This was strictly a period of a subsistence economy in Iowa, and the supply of money in circulation was smaller than that found in the eastern states. Paper money issued by state banks was used widely in Iowa in the 1830's, but most of it was of dubious value and drastically discounted. This lack of a sound paper currency, coupled with a genuine shortage of hard money forced the settlers into a bartering system wherein the early merchants accepted farm products in exchange for goods.

30. Except for the lead mining activities in and around Dubuque, Iowa, the highest and best use of the three cession areas during the 1833-1839 period was for general subsistence homestead farming, preferably on tracts of 80 acres or less. In conjunction with such subsistence farming during this period, and where there was open prairie and grazing land, stock raising was conducted although limited primarily to local consumption.

31. To assist the Commission in determining the fair market values of Royce Areas 175, 226, and 244 as of their respective valuation dates, the petitioners offered the expert testimony of Drs. Conrad R. Hammer and Raleigh Barlowe. These two witnesses jointly authored an evaluation report entitled, "Valuation of Lands in Eastern Iowa", which report contains a great deal of data that the Commission found to be most helpful and [480] informative. The testimony of Drs. Hammer and Barlowe was for the most part explanatory and in support of their report. Based on their studies of all the relevant data in evidence, both witnesses were of the opinion that Royce Areas 175, 226, and 244 had a fair market value exclusive of any improvements thereon in the range of $2.00 to $3.00 per acre as of the 1833-39 period. Both witnesses, however, based their value conclusions on the existence of a "bona fide market" condition, a situation which both acknowledge did not exist as of the respective cession dates but theoretically was not reached in the cession areas until the early 1850's when approximately 75% of the available public land had passed into private hands. As a result both witnesses rely on the conditions affecting land values in eastern Iowa that existed from 15 to 20 years after the subject areas were ceded to the United States. Both of petitioners' experts viewed the subject tracts as being best utilized for commercial farming.

While the petitioners' experts did use private sales data in their computations, the Commission finds the "bona fide market" approach upon which their fair market value conclusions were based is unacceptable and not responsive to the economic, political and other conditions that would have influenced and controlled a land market in eastern Iowa as of the effective cession dates for the three subject tracts. Their heavy reliance upon novel formulae in estimating land improvements, both public and private, as well as their use of certain post cession census data, embodied too much

of the speculative. In the Commission's judgment the petitioners' experts ultimate conclusions on the value of the three [481] subject tracts as of their respective cession dates are unrealistic and not supported by substantial evidence.

32. Defendant offered the testimony of Dr. William Murray as an expert witness on value. In support of his testimony Dr. Murray prepared a valuation report which contained a great deal of useful material. In contrast to the "bona fide market" value approach adopted by the petitioners' experts, Dr. Murray sought to establish fair market values for the subject tracts as of their effective cession dates. In utilizing the market value method, Dr. Murray relied on such contemporary value data as: the physical aspects of the subject tracts including topography, soils, drainage, climate and timber, population figures, transportation facilities, prevailing economic conditions, surveyors' notes, public land sales in nearby areas, settlers' preference for lands, the highest and best use for the subject tracts, and confirmatory hindsight evidence with respect to public land sales in the subject lands after the respective valuation dates. Dr. Murray gave separate treatment to the valuation of the lead mine area at Dubuque, Iowa. Within the 1833-1839 period, Dr. Murray's evaluation conclusions for the three subject tracts including the mineral value of the Dubuque lead mines, ranged between $0.43 and $0.80 per acre. This figure was well below the Government prices of land for the same period, and in the Commission's judgment, based on the same record, is on the conservative side. Dr. Murray's separate valuation of the Dubuque lead mine area in Royce Area 175 as of February 9, 1837, [482] based on there being 46,500 acres of mineral land, was $116,250.00.

33. With the exception of the mining activity around Dubuque, Iowa, Royce Area 175 as of February 8, 1833, the

effective date of the Treaty of 1832, was for the most part raw, unimproved land. The prime plus factor of Royce Area 175 was its physical attributes. Thus the 1833 prospective purchaser of the entire tract would have considered the excellent soils and prairie grass in eastern Iowa, its good climate, its adequate rainfall, and favorable climate, the numerous streams and swift rivers that provided a plentiful water supply, as well as avenues of access into the tract.

On the other hand, the 1833 prospective purchaser of Royce Area 175 would have considered the fact that he was buying an enormous tract of some 5,350,400 acres, the greater proportions of which was far removed from the mainstream of the population growth and settlement that was still to the south of Royce Area 175 and across the Mississippi River in Illinois. In adapting Royce Area 175 to its highest and best use, subsistence homestead farming, he could readily see that subdividing and reselling such a large area in smaller parcels over a period of time involved necessary surveying, management, and selling costs. He would know that his purchase money would cost him a minimum 7% interest at the prime rate. He would also consider the fact that the Indians still held the land adjoining the western boundary of Royce Area 175 and a 217,600 acre reservation that extended well into the southern part of Royce Area 175. [483]

Finally, the 1833 purchaser of Royce Area 175 faced the immediate prospect of selling small tracts of land in competition with millions of acres of public lands in nearby Missouri and Illinois at $1.25 per acre, a market situation that would obviously depress and control the price of the private land sales for many years to come.

Having considered the foregoing and all the evidence of record, the Commission finds that as of February 8, 1833

the fair market value of Royce Area 175, taken as a whole, but excluding the value of the Dubuque lead mines, was $0.90 per acre. To this must be added the value of the Dubuque lead mines.

34. Located within the northern portion of Cession 175 is the Iowa section (sometimes called the Iowa Mining District or the Dubuque Mining District) of the Upper Mississippi Valley Mining District. That whole district includes the southwest part of Wisconsin, the northwest corner of Illinois, and a strip of land in Iowa having a maximum width of about 13 miles, about 54 miles along the west bank of the Mississippi, in the eastern part of Jackson, Dubuque, and Clayton Counties, extending from present-day Bellevue to McGregor, Iowa. The Iowa portion is considered an integral part of the entire Mining District, and, in general, the geology and mineralization are the same on both sides of the Mississippi River. The area of the entire district is about 4,000 square miles, of which the Iowa portion comprises about 288 square miles, or 184,320 acres, and is roughly 11 per cent of the total area. Pursuant to an [484] Act of Congress in 1807 making it unlawful to sell any land belonging to the United States containing lead mines, 180,000 acres of the Iowa Mining District were withheld from public sale after Cession 175 was ceded by the Sac and Fox Nation. The 180,000 acres thus withheld were placed under control of the Land Office having a Superintendent of Mines and for which royalties were exacted that were payable in cash or in lead. This leasing system was opposed by the local Iowa courts and was unpopular with the settlers; consequently, not many leases were made of mines in the reserved lands.

35. The Dubuque mining district is one of the oldest lead producing areas in the United States. The Sac and Fox Indians had mined lead in this area before 1800. In 1788

Julian Dubuque, after whom the present city of Dubuque, Iowa was named, entered into an agreement with the Sac and Fox Indians under which he mined lead near the city of Dubuque until 1810 when he died. After Dubuque's death and until the lands were ceded in 1832, the lead mining operations were conducted by the Sac and Fox Indians.

Dubuque's lead production was estimated in 1805 as being in the vicinity of 20,000 to 40,000 pounds of lead ore a year. In 1810, the Sac and Fox Indians mined about 400,000 pounds of lead which were sold to traders at Prairie du Chien.

36. In 1830 a number of miners from Galena, Illinois, crossed the [485] Mississippi River and began mining operations in the Dubuque area. However, they were removed by Government troops. Following the ratification of the Sac and Fox treaty of cession on February 9, 1833, the miners returned to their operations and Dubuque became the most important town in Iowa and the center of lead-mining activity in Royce Area 175 in the 1830's. An estimated 2,000 miners entered the area.

37. During the 1800's, leadmining in Cession 175 was largely confined to the crevice opening type of lead deposit, which existed in relative abundance. This type of deposit was particularly favorable for the small mine type of operation common in the Dubuque mining district at this time inasmuch as it required a minimal outlay by way of prospecting, and drilling and shooting expenses.

38. Accurate production records for the Upper Mississippi Valley Mining District and especially the Iowa portion during this period prior to 1907 are nonexistent. Early Indian and French production figures are purely guesses. In 1839 Dr. David Dale Owen, a renowned geologist of his time, explored the Upper Mississippi Valley mining district

for the specific purpose of providing an inventory of the mineral lands in this region. Based on the report filed by Dr. Owen as well as all the evidence of record, the Commission finds that in the 1830's the Dubuque mining area in Iowa was responsible for 10% of the total lead production for the entire Upper Mississippi River Valley mining district. Total lead production for the Dubuque area in 1833 was roughly 1,359,300 pounds. By 1839 it had [486] risen to 2,682,610 pounds. Lead prices during this period averaged about $0.04 per pound.

39. In the 1830's and for many years thereafter lead mining methods were relatively simple, if not crude. The only implements were spades, picks, shovels, and a common windlass and tub to remove the earth, stones and water from the pits. Rarely were the pits dug deeper than 40 feet since at this depth water is found and efforts to go deeper are usually abandoned as too costly and not worth the effort.

Cost estimates for lead production in the 1830's vary somewhat but fall generally within the following range. The major expense was the miner's labor. On the average a lead miner can earn $1.00 for each 150 pounds of lead ore mined and elevated to the surface. When reduced by smelting one hundred pounds of ore will produce sixty to seventy pounds of lead. Smelting costs will add at least $4.00 per ton to the price of lead and transportation costs from $20.00 to $40.00 per ton. Overall production costs for lead therefore will run a minimum of 2.5 cents per pound during this period.

40. For fourteen years following the 1832 Sac and Fox treaty of cession, the Dubuque lead mine lands were not for sale. Government leases of the mine areas on a rental or royalty basis were not very successful and both the settlers

and the Iowa courts looked with disfavor on this type of arrangement. Prior to the first public sale in 1847 of the 180,000 acres reserved mineral land in the Dubuque mining area, many [487] persons attempted to obtain special rights to the land by taking possession. While a few entered into mining leases with the United States, others squatted on the land attempting to establish claims. There was considerable trading between miners, speculators and settlers with respect to these claims. Since title to land remained in the United States, none of these so-called sales of mining claims were of any legal validity. However, in 1835, a number of these sales transactions were recorded in Dubuque and Clayton Counties.

41. A good deal of the sales transactions involving mineral lands in the Dubuque area forms the bulk of the brief evaluation report of Dr. William A. Broughton, a geologist, who appeared and testified in these dockets as petitioners' expert witness on minerals and mineral lands. In his report Dr. Broughton set out in capsule form some 20 mineral lot sales transactions taken off the deed records in Dubuque County for the period 1836 through February 1847, some 57 mineral lot sales taken from the same source for the period 1848-50 and some 30 mineral lot sales transactions of unspecified acreage taken from the same source and covering the period 1835 through February 1847. From a sample tabulation of all the sales of known acreage and the consideration paid for the mineral lots, Dr. Broughton concluded that the average mineral lot transaction for those sales recorded in the period 1836 through February 1847 was 13 acres which sold at an average price of $22.38 per acre; for the period 1848 through 1850, the average lot sale was [488] 12.1 acres which sold for an average price of $19.57 per acre. For those mineral lot transactions of unspecified acreage covering the period 1835 through February 1847, an average mineral lot size of 16.4 acres was substituted and the weighted average per acre sale price was calculated to be $20.53. From this sales data, the petitioners seek to value the 180,000 acres of reserved mineral lands in the Dubuque mining area in 1833 at $25.00 per acre.

The Commission finds that the sales data with respect to mineral lot transactions in Dubuque County shows that there was a relatively active market for the sale of mineral lots many years after the 1833 valuation date for Royce Area 175, that in mineral lot transactions the actual acreage involved is not the prime consideration, that some of the transactions are not arm's length transactions, that many of the transactions involved actual "digs", and that the transactions involved the sale of more than just mineral lands and included such things as mining and agricultural equipment to cultivate farm land, farm animals, houses and other equipment.

Apart from the above qualifications the Commission finds that this mineral lot sales data is of no genuine probative value in establishing the 1833 fair market value of the Dubuque lead lands. The trafficking in mineral lots is essentially a speculative venture, and prices established in such a market are indicative of the value of these properties as speculations and nothing more. The speculative value of such property does not establish or prove its mineral content. *The Tlingit and Haida Indians of Alaska* v. *United States,* 182 Ct. Cl. 13 (1968). [489]

Subsequent events following the cession of Royce Area 175 proved that most of the 180,000 acres originally reserved in the Dubuque area as mineral lands and withheld from public sale had no economic value as mineral lands. Under the Act of July 11, 1846 (9 Stat. 37) Congress authorized the President to sell all such reserved land

supposed to contain lead ore in Arkansas, Illinois, Wisconsin and Iowa at a minimum of $2.50 per acre for so much as was proved to contain lead ore actually discovered and being worked. The residue would then be sold at the prevailing rate of $1.25 per acre. Some 285,126 acres, including over 180,000 acres of the reserved mineral lands, were offered for public sale in Iowa in March of 1847 and 697.80 acres were sold at the minimum of $2.50 per acre price.

In his testimony Dr. Broughton recapped the material in his report covering such items as the history of lead mining in Iowa, the findings in David Dale Owen's report, and the mineral lot sales data referred to above.

42. The well-informed prospective purchaser of Royce Area 175 in 1833 would have taken into consideration certain basic factors in determining what the Dubuque lead mining area was worth as an investment upon which he could expect a reasonable return.

While there were opinions voiced that the lead supply in the Upper Mississippi Valley Mining District was inexhaustible, he would have considered 20 years as the normal productive life of the Dubuque mining region, — absent new discoveries. The prospective purchaser [490] would have familiarized himself with the pre-1833 lead production figures for the Upper Mississippi Valley Mining District, and noting that there was a steady increase in lead production each year, he could calculate an increased average annual production of 3,000,000 pounds of lead for the Dubuque area. Stepping up lead production to meet this projected annual figure would require additional capital outlay. He would know that the price of lead on the market was a stable four cents per pound and that production cost ran a minimum 2.5 cents per pound.

While the Dubuque lead area was seemingly blessed with a high grade of lead ore and his prospects seem good for expanding existing mining operations in order to meet the projected annual lead production figure, mining ventures do contain a distinct element of risk. Considering the risk factor and the necessary redemption of capital expenditures over the productive life span of the mining operations, the prospective purchaser should realize a minimum 15% return on his investment with a redemption of capital rate of 5%.

The Commission, therefore concludes that the 1833 prospective purchaser of Royce Area 175 would be willing to invest an additional $240,000 to cover the value of the Dubuque mineral area, and that this amount should be added to the overall 1833 fair market value of Royce Area 175 as set forth in Finding 33. [491]

43. In light of all the evidence of record and the matters set forth in the above findings of fact, the Commission finds and concludes that, as of February 9, 1833, the effective date of the Sac and Fox Treaty of cession of September 21, 1832, the fair market value of the Sac and Fox interest in Royce Area 175 was $4,276,320.

44. The Commission finds that the consideration paid by the United States to the Sac and Fox Nation under the Treaty of 1832 for Royce Area 175 was $701,361.79, computed as follows:

a) Under Article III the United States agreed to pay to the Sac and Fox Indians the sum of $20,000 in specie annually for 30 years, a total of $600,000, which sum was duly paid.

b) As further consideration the United States agreed under Article IV of the treaty to maintain "for the use and benefit of the Sacs and Foxes" for a period of 30 years one

additional blacksmith and gunsmith shop with the necessary tools, iron and steel, and to make a yearly allowance for the same period to the said tribe of forty kegs of tobacco and forty barrels of salt. The sum of $61,361.79 was expended by the United States in fulfilling its obligations under Article IV of the treaty.

c) Under Article V and "at the earnest request of the said confederated tribes," the United States agreed to pay the sum of $40,000 to the Sac and Fox Indian traders, said sum to be in full satisfaction of the claims of the said traders against the tribe. This sum was duly paid by the United States.

The Missouri Sac and Fox by a separate treaty concluded on October 21, [492] 1837 (7 Stat. 543) ceded all of its interest to lands in Iowa. Pursuant to the stipulation for entry of final judgment which was approved and entered by the Commission on March 2, 1965, in Docket 138, the *Iowa Tribe of The Iowa Reservation in Kansas and Nebraska* v. *The United States,* 15 Ind. Cl. Comm. 42, it was provided that $140,800 of the sum paid to the Sac and Fox of Missouri under that Treaty shall be credited to the Government "on account of payments for Royce Cessions 175, 226, 244 and 262, and allocated in Dockets numbered 158, 209, 231 and 153." The acreage represented by the interest of the Sac and Fox Nation in Cession 175 comprises approximately 31.52% of the total acreage represented by the Nation's interest in the three cession areas and in Cession 262. The sum of $44,380 represents 31.52% of the total consideration of $140,800 paid the Missouri Sac and Fox under the 1837 Treaty which remains to be allocated. The corresponding percentages applicable to Cessions 226 and 244 are respectively .75% and 7.35%.

45. The Commission finds that the United States paid a total consideration of $745,741.79 to the Sac and Fox Indians

for the cession of all their right, title and interest to Royce Area 175. The Commission further finds and concludes that payment of $745,741.79 for the Sac and Fox interest in Royce Area 175 in 1833 having a then fair market value of $4,276,320 was payment of an unconscionable consideration under the provisions of the Indian Claims Commission Act.

The Sac and Fox petitioners in Docket No. 158 are therefore entitled to recover from the defendant as additional compensation for their interest in Royce Area 175 the sum of $3,530,578.21. [493]

46. As the Commission has previously found, Royce Area 226 is a narrow strip of land extending along both sides of the Iowa River into the lower portions of Royce Area 175. It is approximately 10 miles wide and 40 miles in length and it was popularly known as the Keokuk Reserve. In 1837 it was surrounded on three sides by lands now substantially free of Indian tribal interests.

Owing principally to its unfortunate location and unusual dimensions, Royce Area 226 provide to be unsuitable for the needs and welfare of Indian occupants. With white squatters moving into the adjacent areas, the Sac and Fox Chiefs realized that in order to avoid future conflict with white settlers they would have to abandon the tract. In addition, wild game that was still on the reserve was being rapidly depleted. Under these circumstances, the principal Sac and Fox chiefs expressed a desire to sell the tract and entered into negotiations with the Government representatives to effect a treaty of cession. These negotiations resulted in the Treaty of September 28, 1836, whereby the United States purchased the Keokuk Reserve. Congress subsequently ratified this treaty on October 13, 1837. After reviewing the events leading up to the 1836 Sac and Fox

treaty, including the treaty minutes, this Commission finds no evidence of undue pressure or coercion exerted by responsible Government officials on the Indians relative to ceding Royce Area 226, nor do we find any evidence of deception or the withholding of vital information relative to value of the lands, or any other conduct on the part of the Government that would support allegations that the Treaty of 1836 was executed under duress. [494]

47. A prospective purchaser of Royce Area 226 in 1837 would have considered the fact that he was buying as a unit 217,600 acres of excellent farm land situated in southeastern Iowa along both sides of the Iowa River and readily accessible to potential settlers. He would have been cognizant that based on topography, climate and other environmental features of the area, Royce Area 226 was best suited for subsistence homestead farming on tracts of 80 acres or less. The prospective buyer could see that the bulk of the Iowa population was in southeastern Iowa, and that in reality "squatters," were moving into the adjacent lands even though they were not yet available for public sale. He would have known that a territorial government had already been organized, that the government surveys of the adjacent lands were in progress, that Des Moines and Dubuque Counties had already been established prior to any surveys, and that the territorial legislature was pressuring Congress to enact some form of pre-emption law that would guarantee squatters prime rights to their lands and the improvements thereon in the event of public sale. All of these factors were strong indicators that Government lands in eastern Iowa would soon be on the market.

Thus, any prudent prospective purchaser of Royce Area 226 would have to face the immediate prospects of competing in the market place with an enormous quantity of equally comparable land that could be purchased in 80 acre tracts at a uniform $1.25 per acre; that his only competitive

advantage would be to undercut the Government price on his initial sales or be able to hold his purchase until adjacent public lands had been sold off and market conditions were more favorable for private sales. [495]

Considering all the value factors as they existed in 1837, and particularly the fact that there was no open market for the public or private sale of land in eastern Iowa at that time, the Commission finds and concludes that as of October 28, 1837, the effective date of the 1836 Sac and Fox Treaty of cession, Royce Area 226 had a fair market value of $1.25 per acre.

48. Under the Treaty of 1836, the United States agreed to pay to the Sac and Fox Indians for the cession of Royce Area 226 the following consideration:

1. Under Article 2, the United States ". . . in consideration of the cession contained in the preceding article" . . . , agreed to pay the Indians $30,000 and $10,000 annually for ten successive years thereafter; to pay $1,000.00 to the widow and children of the Indian Agent who had been killed by the Indians; and $44,459.12 to certain listed creditors of the Sac and Fox Indians in partial satisfaction of tribal indebtedness thereto. Total consideration agreed to be paid by the United States was $175,459.12. According to the Government accounting records, $175,444.17 was actually disbursed pursuant to Article II.

2. By Article 3 of the Treaty of the United States further agreed to deliver to the Sac and Fox "two hundred horses, as near that number as can be procured with the sum of" $9,341.00. Government accounting records show an expenditure in the above amount pursuant to Article 3.

3. Under Article 4 "At the special request of the Sac and Fox Indians . . ." the United States agreed to pay $7,000

for the benefit and [496] support of seven half breeds of the Sac and Fox Nation. Government accounting records show an actual expenditure of $5,342.40.

4. Under Article 5 of the treaty "at the special request of the said confederated tribes of Sac and Fox Indians . . ." the United States agreed to pay $200.00 to the Indian agent for the use and benefit of the two children of a deceased tribal friend. Government accounting record show an expenditure in the above amount pursuant to Article 5.

The total consideration agreed to be paid by the United States to the Sac and Fox Nation under the 1836 treaty was $192,000.12. To this amount there must be added $1,056.00 which represents that part of the consideration allocable to Royce Area 226 that was paid to the Missouri Sac and Fox under the Treaty of October 21, 1837 (7 Stat. 543).

49. The Commission finds and concludes that as of October 13, 1837, the effective date of the Treaty of 1836, the Sac and Fox undivided one-half interest in Royce Area 226 was worth $136,000.00 for which interest the United States agreed to pay and did in fact pay more than full value. Accordingly, the defendant is not liable to the Sac and Fox petitioners in Docket No. 209 on their claim for additional compensation for the cession of Royce Area 226 and said claim should be dismissed.

50. Royce Area 244 is located in eastern Iowa, contiguous to and entirely west of Royce Area 175. It is triangular in shape and rather elongated. That portion of the triangle corresponding to the base line forms the western boundary of the tract and runs generally north and south. [497] The apex of the triangle and the other two sides form the eastern boundary of the tract and the entire western boundary of Royce Area 175.

As of February 16, 1838, the effective date of the Sac and Fox Treaty of October 21, 1837 (7 Stat. 540), Royce Area 244 was an unsurveyed, raw and unimproved tract of land containing 1,189,000 acres of excellent farm land. It was well watered and easily accessible, there being a network of six rivers equidistance apart that flowed through the tract. As was the general situation throughout eastern Iowa the topography, climate, and rainfall were favorable to farming. As the Commission found with respect to Royce Areas 175 and 226, Royce Area 244 as of 1838 was best suited for subsistence homestead farming on tracts of 80 acres or less.

There being only a four month differential between the 1837 valuation date for Royce Area 226 and the 1838 Royce Area 244 valuation date, the Commission finds that with one qualification the valuation factors that influenced the prospective purchaser of Royce Area 226 would have the same effect on the thinking of the 1838 prospective purchaser of Royce Area 244. This is especially true with respect to the lower part of Royce Area 244.

Thus the 1838 prospective purchaser of Royce Area 244 would also face the prospect of shortly competing with the public sale of an enormous area of Government owned land of equal comparability, that was located even nearer to the potential buyers than Royce Area 244, and which could be purchased at a uniform $1.25 per acre price. He would know that until a substantial quantity of this public land had passed into private ownership its availability [498] in large quantities could only depress the price that would be paid for small unimproved tracts at private sale.

With the northern half of Royce Area 244 being especially far removed from the normal part of new settlement that was flowing toward and into southeastern Iowa at this

time, there could be no genuine demand or market for these particular lands until sometime well into the future. The prospective purchaser of Royce Area 244 in 1838 would have to estimate his immediate purchase price in light of resales at some future date with necessary adjustments to cover surveying management, and selling costs. In addition to the above, the prospective purchaser of Royce Area 244 in 1838 would have considered the fact that the lengthy western boundary of the tract formed the eastern boundary of the Indian country to the west, a situation not calculated to promote private sales of land when comparable Government lands at $1.25 would still be available east of the tract.

Based on all the evidence of record and all the matters set forth in the preceding findings of fact, the Commission concludes that Royce Area 244, as of February 13, 1838, the effective date of the 1837 Sac and Fox treaty of cession, had an average fair market value of $1.10 per acre.

51. The parties are in agreement and the Commission finds that the consideration, which the United States agreed to pay the Sac and Fox Nation pursuant to the Treaty of October 13, 1837, allocable to Royce Area 244 is $135,778.06. The value of the consideration paid to the Missouri Sac and Fox under the said treaty of October 21, 1837, allocable to Royce Area 244 [499] was $10,349.00. The Commission has already determined that the Sac and Fox Nation exclusively owned the northern two-thirds of Royce Area 244 and enjoyed an undivided one-half interest in the lower one-third of the tract. We find that, as of February 13, 1838, the effective date of the 1837 Sac and Fox treaty of cession, the fair market value of the Sac and Fox interests in Royce Area 244 was $1,089,926.85, and that payment of only $146,127.06 for said Sac and Fox interest was payment of an unconscionable consideration.

As additional compensation for their interest in Royce Area 244 that was ceded under the Treaty of 1837, the Sac and Fox petitioners in Docket No. 231 are entitled to recover from the defendant the sum of $943,799.79.

52. The Iowa Nation ceded its interest in Royce Areas 175, 226 and 244 to the United States by the Treaty of October 19, 1838 (7 Stat. 568). This treaty was concluded with the Iowa Nation at the Great Nemahaw opening on the south side of the Missouri River in Kansas where the Iowa were then living with the Missouri Sac and Fox on a 400 section reservation that had been set aside for both tribes under the Treaty of September 17, 1836 (7 Stat. 511). We find no evidence in the record that the Iowa Nation concluded this Treaty of 1838 under duress. By this same Treaty of 1838 the Iowa Nation also ceded whatever interest it had in Royce Area 262, which is an enormous tract that adjoins Royce Area 244 on the west. For the cession of its interest in all four areas the United States agreed under "Article 2d" of the 1838 treaty to pay to the Iowa Nation $157,500; and, ". . . in addition to the above consideration . . ." the United States further agreed under "Article 3d" to build ten houses on the Iowa reservation. Government accounting [500] records in evidence show that for this purpose the United States spent $5,000.

The total consideration paid to the Iowa Nation under the 1838 Iowa treaty was $162,500 of which amount $80,600 is allocable to the Iowa interests in the three cession areas.

53. As of February 28, 1839, the effective date of the 1838 Iowa treaty of cession, the Iowa Nation held an undivided one-half interest in some 2,345,133 acres, which acreage comprises roughly the lower third of the three cession area in the southeastern part of Iowa.

As the Commission has already found, it was in the southeastern part of Iowa that the then Iowa population

was concentrated. Approximately 60 percent of the nearly 23,000 people in Iowa were living in the extreme southeast corner of the territory. County organization had been completed in southeastern Iowa and local governments were functioning.

With the exception of the Royce Area 244, all public lands in southeastern Iowa had been surveyed. The public sale of land had commenced on November 15, 1838. Records from the Burlington land office show that over 50 percent of the public land offered for sale in the 1838-39 period had been sold by 1840. Particularly heavy was the sale of public land in the four counties in the southeast corner near the Mississippi River and along the Des Moines River. Preemption claimants contributed greatly to the initial burst of public land sales.

Consistent with its highest and best use of subsistence homestead [501] farming, a prospective purchase of the Iowa interest in southeastern Iowa in early 1839 would have considered the fact that he was purchasing an area in which the lands had now been freed of all Indian activity, and, having been surveyed and offered for public sale, were now moving rapidly into private ownership. He could see evidence of both private and public improvements to the land, through the efforts of "squatters" and the organization of both territorial, county and local government. He could see that the population was rapidly increasing, and that southeastern Iowa was favorably situated in the path of the general movement of white settlement west of the Mississippi River.

Considering all the valuation factors as set forth in the preceding findings of fact, as well as all the evidence of record, the Commission finds that as of February 28, 1839, the effective date of the 1838 Iowa treaty cession, the 2,345,133 acres in southeastern Iowa in which the Iowa

Nation held an undivided one-half interest had a fair market value of $1.60 per acre, or $1,876,106.40. For this interest the Iowa Nation was paid an overall unconscionable consideration of $80,600.

Accordingly, we find the Iowa petitioners are entitled to recover the following sums from the defendant as additional compensation for their interest in the three cession areas.

(a) *Docket No. 158*—The value of the Iowa undivided one-half interest in the 1,731,200 acres in Royce Area 175 as of February 28, 1839 was $1,384,960. The consideration allocated under the Treaty of 1838 to Royce Area 175 and paid to the Iowa Nation was $44,525. Accordingly, the Iowa [502] petitioners in this docket are entitled to recover from the defendant the sum of $1,340,435.

(b) *Docket No. 209*—The value of the Iowa undivided one-half interest in the 217,600 acres in Royce Area 226 as of February 28, 1839 was $174,080. The consideration allocated to Royce Area 226 under the Treaty of 1838 and paid to the Iowa Nation was $5,525. Accordingly, the Iowa petitioners in this docket are entitled to recover from the defendant the sum of $168,555.

(c) *Docket No. 231*—The value of the Iowa undivided one-half interest in the 396,333 acres in the southern part of Royce Area 244 as of February 28, 1839 was $317,066.40. The consideration allocated to Royce Area 244 under the Treaty of 1838 and paid to the Iowa Nation was $30,550. Accordingly, the Iowa petitioners in this docket are entitled to recover from the defendant the sum of $286,516.40.

54. The Commission further finds that there are no gratuitous expenditures between November 2, 1804 and June 30, 1960 that can be charged against the judgments rendered herein in favor of the Sac and Fox petitioners, said gratui-

ties having been compromised and set off against the award made in Docket No. 138, *The Iowa Tribe, etc.* v. *United States, supra.* In like manner, there are no gratuitous expenditures between August 24, 1824 and June 30, 1956 chargeable against the judgments rendered herein in favor of the Iowa petitioners, said gratuities having been compromised and set off against the award made in Docket No. 135, *The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska,* 15 Ind. Cl. Comm. 248. [503]

By its motion of March 5, 1969, entitled "Motion To Remove Hearing On Offsets From The Trial Calendar", the defendant has waived the presentation of any additional gratuities subsequent to June 30, 1960 as to the Sac and Fox petitioners, and subsequent to June 30, 1956 as to the Iowa petitioners in Docket Nos. 158, 209 and 231.

Accordingly, the judgments rendered herein in favor of the Sac and Fox and Iowa petitioners are final in all respects.

John T. Vance, *Chairman*

Jerome K. Kuykendall, *Commissioner*

Richard W. Yarborough, *Commissioner*

Margaret H. Pierce, *Commissioner*

(Commissioner Blue did not participate in the consideration or decision in this case.) [504]

BEFORE THE INDIAN CLAIMS COMMISSION

The Sac and Fox Tribe of Indians of Oklahoma, et al.,	Docket No. 158
The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.,	Docket No. 209
The Sac and Fox Tribe of Indians of Oklahoma, et al.,	Docket No. 231
Petitioners,	
v.	
The United States,	
Defendant.	

FINAL AWARDS

Upon the findings of fact and opinion this day entered herein, which findings of fact and opinion are hereby made a part of this order, the Commission concludes as a matter of law that:

1. Under the Treaty of September 21, 1832 (7 Stat. 374), hereinafter referred to as the Treaty of 1832, the Sac and Fox Nation ceded to the United States all its right, title, and interest to the lands in Royce Area 175 in eastern Iowa; and, that, as of February 9, 1833, the effective date of the Treaty of 1832, the fair market value of the Sac and Fox interest in Royce Area 175 was $4,276,320.

2. Under the Treaty of 1832, and the Missouri Sac and Fox Treaty of October 21, 1837 (7 Stat. 543), the United States paid $745,741.79 to the Sac and Fox Nation for its interest in Royce Area 175.

3. The payment of $745,741.79 by the United States for the Sac and Fox interest in Royce Area 175, which interest had a then fair market value of $4,276,320, was payment of

an unconscionable consideration under the Indian Claims Commission Act, and the defendant is therefore liable to the Sac and Fox petitioners for additional compensation in the sum of $3,530,578.21. [505]

4. Under the Treaty of September 28, 1836 (7 Stat. 520), hereinafter referred to as the Treaty of 1836, the Sac and Fox Nation ceded to the United States its undivided one-half interest in Royce Area 226, a 217,600 acre tract in southeastern Iowa, which Sac and Fox interest, as of October 13, 1837, the effective date of the Treaty of 1836, had a fair market value of $136,000.

5. Under the Treaty of 1836 and the Missouri Sac and Fox Treaty of October 21, 1837, *supra,* the United States agreed to pay and did pay to the Sac and Fox Nation for its undivided one-half interest in Royce 226 the sum of $193,056.12, which sum is in excess of its then fair market value.

6. The defendant is not liable to the Sac and Fox petitioners for additional compensation for the cession of the Sac and Fox undivided one-half interest in Royce Area 226 under the Treaty of 1836.

7. Under the Treaty of October 21, 1837 (7 Stat. 540), hereinafter referred to as the Treaty of 1837, the Sac and Fox Nation ceded to the United States all its right, title, and interest to the lands in Royce Area 244 in eastern Iowa, which Sac and Fox interest, as of February 13, 1838, the effective date of the Treaty of 1837, had a fair market value of $1,089,926.85.

8. Under the Treaty of 1837, and the Missouri Sac and Fox Treaty of October 21, 1837, *supra,* the United States agreed to pay and did pay $146,127.06 to the Sac and Fox Nation for its interest in Royce Area 244.

9. The payment of $146,127.06 by the United States for the Sac and Fox interest in Royce Area 244, which interest had a then fair market value of $1,089,926.85, was payment of an unconscionable consideration under the Indian Claims Commission Act, and the defendant is therefore liable to the Sac and Fox petitioners for additional compensation in the sum of $943,799.79.

10. Under the Treaty of October 19, 1838 (7 Stat. 568), hereinafter referred to as the Treaty of 1838, the Iowa Nation ceded its undivided one-half interest in 2,345,133 acres of land in Royce Areas 175, 226, and 244 in southeastern Iowa, which Iowa interest, as of February 28, 1839, the effective date of the Treaty of 1838, had a fair market value of $1,876,106.40.

11. Under the Treaty of 1838 the United States paid the Iowa Nation $80,600 for its undivided one-half interest in Royce Areas 175, 226, and 244. [506]

12. The payment of $80,600 by the United States for the Iowa interest in Royce Areas 175, 226, and 244, which interest had a then fair market value of $1,876,106.40 was payment of an unconscionable consideration under the Indian Claims Commission Act, and the defendant is therefore liable to the Iowa petitioners for additional compensation in the sum of $1,795,506.40.

13. No gratuitous offsets are chargeable against the several judgments herein, said gratuities having been either set-off against the awards made in Docket No. 138, *The Iowa Tribe, etc.,* v. *United States,* 15 Ind. Cl. Comm. 42, and in Docket No. 135, *The Iowa Tribe, etc.,* v. *United States,* 15 Ind. Cl. Comm. 248, or waived by the defendant.

IT IS THEREFORE ORDERED that the Sac and Fox and Iowa petitioners, for and on behalf of the Sac and Fox

Nation and the Iowa Nation, and all of their members, do have and recover of and from the defendant,

a) In *Docket No. 158,* for the Sac and Fox petitioners, the sum of $3,530,578.21, and for the Iowa petitioners, the sum of $1,340,435.00.

b) In *Docket No. 209,* for the Iowa petitioners, the sum of $168,555.00.

c) In *Docket No. 231,* for the Sac and Fox petitioners, the sum of $943,799.79, and for the Iowa petitioners, the sum of $286,516.40.

IT IS FURTHER ORDERED that the claim of the Sac and Fox petitioners in Docket No. 209 for additional compensation for the cession to the United States of all right, title, and interest in Royce Area 226 under the provisions of the Treaty of 1836, be and the same is hereby dismissed.

Dated at Washington, D. C., this 12th day of May, 1969.

John T. Vance, *Chairman*

Jerome K. Kuykendall, *Commissioner*

Richard W. Yarborough, *Commissioner*

Margaret H. Pierce, *Commissioner*

(Commissioner Blue did not participate in the consideration or decision in this case.) [507]

BEFORE THE INDIAN CLAIMS COMMISSION

The Sac and Fox Tribe of Indians of Oklahoma, et al.,	Docket No. 158
The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.,	Docket No. 209
The Sac and Fox Tribe of Indians of Oklahoma, et al.,	Docket No. 231
Plaintiffs,	
v.	
The United States of America,	
Defendant.	

(22 Ind. Cl. Comm. 439)

ORDER DENYING PLAINTIFFS' MOTION TO REHEAR, AND FOR OTHER PURPOSES

UPON CONSIDERATION of all matters set forth in plaintiffs' motion to rehear filed herein on July 31, 1969,

IT IS ORDERED that plaintiffs' motion to rehear be, and the same is hereby, denied.

IT IS FURTHER ORDERED that the Commission's finding of fact "27." (20 Ind. Cl. Comm. 439, 476 (1969)) be amended as follows:

1. That the second sentence of the third paragraph on page 476 be stricken, and in lieu thereof is substituted the following:

> "There has been reproduced and placed in evidence a compilation of some 13,600 private transactions of $5.00 per acre or less taken off the land record books of the nineteen counties within the three cession area."

2. That the last paragraph on page 477 be stricken, and in lieu thereof is substituted the following: [439]

> "Totaling up all the private sales transactions of $5.00 per acre or less in the three cession area during the 1839-1849 period the Commission finds that 959,446 acres [478] were sold for $2,359,378.00 or at an average price of $2.46 per acre, and that the average transaction was 70.3 acres."

It Is Further Ordered that the third sentence in the third paragraph on page 448 of the Commission's opinion is hereby stricken, and in lieu thereof is substituted the following:

> "The Commission in some detail made a specific finding with respect to those private sales transactions of $5.00 per acre or less in eastern Iowa for the 1839-49 period, and we have found that for this entire ten year period the average private sale or transaction involved only 70.3 acres for which the buyer paid $2.46 per acre."

Dated at Washington, D. C., this 11th day of February, 1970.

Jerome K. Kuykendall, *Chairman*

John T. Vance, *Commissioner*

Richard W. Yarborough, *Commissioner*

Margaret H. Pierce, *Commissioner*

Brantley Blue, *Commissioner* [440]

Before the Indian Claims Commission

The Iowa Tribe of the Iowa Reservation In Kansas and Nebraska, et al.,

The Sac and Fox Tribe of Indians of Oklahoma, et al.,

Plaintiffs,

v.

The United States of America,

Defendant.

Docket No. 153

Decided: February 4, 1970
(22 Ind. Cl. Comm. 385)

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the Opinion of the Commission.

The Commission has before it the question of the damages to which the Iowa Nation and the Sac and Fox Nation are entitled. In an earlier decision, 7 Ind. Cl. Comm. 98 (1959), we held that the Iowa Nation had recognized title to a tract of 3,184,000 acres in the southwest portion of Royce 262 ("Area 262 South"), and that the Sac and Fox Nation had recognized title to the remaining 8,592,000 acres of the Cession ("Area 262 North"). The valuation date of the Iowa tract is February 28, 1839, and the valuation date of the Sac and Fox tract is February 15, 1843.

As evidence of the value of the land, defendant relied primarily upon the report and testimony of Dr. William G. Murray. Dr. Murray valued 262 South at 40¢ per acre and 262 North at 50¢ per acre. However, he did not in any way consider private resale transactions either in the subject tract or in adjacent areas in eastern Iowa or northern

Missouri. Dr. Murray indicated that such resales were not considered because he was unable to determine the amount of improved lands which were involved in such transactions. While we realize that it is impossible to determine with exactness the extent of improvements, methods of estimating them are available. We feel that actual resale data in comparable areas at the same or comparable times are of such probative value that we can give little weight to an appraisal which ignores such data. [386]

Plaintiffs introduced voluminous evidence on rate of sales of public lands, resales of lands in eastern Iowa and in the cession area, and on land speculation in Iowa. Much of this information was tabulated by electronic data processing techniques.

Plaintiffs have made several tabulations of resale values of lands in the cession area and in eastern Iowa and have made various adjustments to take account of partial financing transactions and of improvements. These resale prices of course reflect the prices of individual sales of small tracts and not the price which a purchaser would pay for the large acreage in either 262 North or 262 South. A purchaser would also consider the length of time which would elapse until he could resell the lands to settlers.

Resales of land in the cession area, we feel, do not carry great weight since they would not have been known to a purchaser on the valuation dates and because they reflect a land market with far different patterns of settlement than existed on the earlier valuation dates. The resales in eastern Iowa from 1838 to 1843 are, we feel, of more relevance. Many of them would have been known to a purchaser, particularly as of the valuation date of 262 North. They reflect the settlement pattern in Iowa at the relevant valuation dates and thus indicate the market expectations which

a purchaser might reasonably have in regard to Cession 262. The differences between the lands in eastern Iowa and Cession 262 are relatively minor, and we have examined those differences in our findings of fact. [387]

Certain of plaintiffs' data was based on resales of particular areas when 75% of the government lands in that area had passed into private hands. Plaintiffs concluded that it was at this point that a normal or bona fide market in lands, unaffected by large amounts of public lands available at the minimum statutory price of $1.25 per acre, existed. We have previously held that, as a matter of law, a proper valuation must consider the effect of competing public land sales in the area. *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 20 Ind. Cl. Comm. 439, 444-445 (1969); see also, *The Miami Tribe of Oklahoma et al.,* v. *United States,* 150 Ct. Cl. 725, 733, 281 F.2d 202, 207 (1960), *cert. denied,* 366 U.S. 924 (1961).

We have found that there was a significant difference in the potential for rapid settlement between the Iowa tract in 1839 and the Sac and Fox tract in 1843. In 1839, the Sac and Fox still hunted throughout the entire cession area, and while their eventual removal from the area could no doubt be assumed, the date of such removal was in the uncertain future. The public lands in eastern Iowa had begun to be offered for sale only in 1838, and much remained to be offered, even in the southern portion of the area.

In 1843, the Sac and Fox cession finally opened a large area in central Iowa, although by the Treaty of October 11, 1842, 7 Stat. 596, the Sac and Fox retained the right to occupy the western portion of the Cession until 1845. Over half of the entire Cession 262 and most of 262 South were included in this western portion. By 1843 much more land

in eastern Iowa had been offered and sold. [388] Although much land remained for sale in eastern Iowa as a whole, 67% of the land that had been offered in 79 southern townships had been entered. Except for the land remaining to be offered in Cession 244, the natural route of settlement along the Des Moines and other rivers of the southeast would mean that land in Cession 262 would be the next to come into heavy demand.

The potential demand for land as measured by the likely path of settlement and the barriers to acquisition have been of particular concern to the Commission in valuing lands adjacent to Cession 262. Thus in the *Iowa Tribe et al.* v. *United States,* 12 Ind. Cl. Comm. 487, 512-513 (1963) affirmed in part and reversed in part 179 Ct. Cl. 8, 383 F.2d 991 (1967) *cert. denied,* 389 U.S. 900 (1967), in valuing two tracts of land in northern Missouri which had been owned by the same tribes as are plaintiffs in the present case we found:

> "We have concluded that the two tracts are reasonably comparable as to their physical and topographical characteristics, including such things as soil quality, terrain, availability of land, water, timber, and minerals, and also as to climate and rainfall. . . .
>
> "There is, however, a marked difference with respect to the location of each tract relative to the path and direction of settlement and population growth that developed in the Missouri territory in the early 1800's."

The Commission there found separate values for each tract though their valuation dates were identical.

We have also had occasion to value the lands in eastern Iowa, *The Sac and Fox Tribe of Indians of Oklahoma et al.,* v. *United States,* 20 Ind. Cl. Comm. 439 (1969). There too considerable attention was given to patterns of population movement and the [389] likely speed of settlement. These factors have been important in determining separate values

for separate areas on different valuation dates. Likewise in the present case we find that these factors call for assigning a different value to each of the two portions of Cession 262.

In our findings of fact we have examined the evidence relating to the quality of the land being valued, climate, resources, population movement, economic conditions, resales of reasonably comparable lands and other factors. Based on all the evidence, we have concluded that the land in the Iowa portion of Cession 262 was worth $2,865,600 or an average of 90¢ per acre, on its valuation date, and the land in the Sac and Fox portion of Cession 262 was worth $12,028,800 or an average of $1.40 per acre, on its valuation date.

Also at issue in the present case are the amounts paid by the United States as consideration for Cession 262 under each of the three treaties involved. The amount paid under the Iowa Treaty of October 19, 1838, 7 Stat. 568, has been settled by our finding No. 52 in Docket Nos. 158, 209, 231, *The Sac and Fox Tribe et al.,* v. *United States,* 20 Ind. Cl. Comm. 439, 501 (1969). Similarly that decision plus an earlier stipulation by the parties has determined the consideration under the Treaty with Sac and Fox of Missouri dated October 21, 1837, 7 Stat. 543. Since the parties' stipulation discussed in finding of fact No. 34 provides that $140,800 "is to be accredited to the Government", we have credited in this case in addition to the $85,025 allocable to Royce Cession 262, the $1,056 [390] allocable to Royce Cession 226 but not credited to the government in other dockets because it was found that full value had been paid for Cession 226.

More difficult problems are raised by the Sac and Fox Treaty of October 11, 1842, 7 Stat. 596, Article II provides

in part that the United States is "to pay annually to the Sac and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars". The government claims that it should be credited with the total of its payments from 1843 to 1909, i.e. $2,640,000, plus $800,000 paid to the Sac and Fox Indians in 1909 pursuant to Congressional authorization, 35 Stat. 781, 803 (1909).

The computation of deferred payments and annuities as consideration has been much litigated. Most recently, the Court of Claims has faced the issue in *Pawnee Indian Tribe of Oklahoma et al.*, v. *United States*, 157 Ct. Cl. 134, 301 F.2d 667 (1962), *cert. denied*, 370 U.S. 918 (1962). The Court held that deferred payments will be credited to the government in full. It also held that in the case of a perpetual annuity "the United States should be credited with that amount which, had it been paid to the tribe, could have been invested by it to yield the amount of the yearly payments required by the treaty." 157 Ct. Cl. 134, 140, 301 F.2d 667, 670 (1962). In the present case the government attempts to characterize the annual payments of "an interest of five percentum upon the sum of eight hundred thousand dollars" under Article II of the treaty as deferred payments. We think that the history of the treaty clearly indicates [391] that this provision was meant to provide for a perpetual annuity. The letter of September 3, 1841, from the Secretary of War to Treaty Commissioners Chambers, Doty and Crawford (Pet. Ex. A-22) makes this clear. The Commissioners were instructed as follows:

> "It is not thought that very large annuities are a blessing to Indians. . . . It seems to me it would be good policy to keep down the annuities and agree, if necessary, to pay a considerable sum in cash. Whatever of the consideration assumes an Annuity shape ought to be the calculated interest on such portion of the consideration money as may be agreed on—the principal to be invested, or retained in the Treasury, and the interest appropriated annually, at the option of the Government. Their land in Iowa is computed a near ten millions of acres—the price of it may equal one million or even more dollars—but I am deeply impressed with the idea that large annuities as money payments are a disadvantage to unclaimed savages—a proper proportion and the largest of the annuities ought to be furnished in goods if they will assent to it."

The minutes of the treaty negotiations further indicate that a perpetual annuity was intended. Governor Chambers presented the government's offer as follows (Def. Ex. 256: Minutes of council commencing October 4, 1842):

> "Your Great Father has told me to say to you now that he still wishes to buy the whole of your country. . . .
>
> "I will now tell you what he offered. He will give you one million dollars (one thousand boxes of money). Out of that he expects you to pay all the debts you now owe. He will put a part of it in such a situation that it will never lessen *and give you so much a year through all time;* that is he will give 5% a year or fifty dollars on each box."
>
> • • •
>
> "The council having reassembled . . . Governor Chambers proceeded to read the articles of the treaty to the [392] Indians present and to have every part of it carefully interpreted to them . . . [T]here was a blank left for the insertion of the aggregate amount of their debts. . . . There was also a blank for the amount of the national fund which they proposed to retain each year *out of their annuities*. . . ." (Emphasis added).

Thus we conclude that the payments described in Article II of the Treaty of October 11, 1842, were intended to be a perpetual annuity and that credit should be allowed for consideration of $800,000 by reason of this provision.

A number of the expenditures listed in the report of the General Accounting Office were for expenses which under the treaty were to be paid from the annuities. The government, of course, should not receive additional credit for these expenditures. Under Article III of the treaty, it is possible to imply an obligation for the government to pay for moving costs of the tribe. However the G.A.O. Report lumps such costs together with subsistence payments which under the treaty were to be retained out of amounts due the tribe. Thus even if we were to find that payment for moving the tribe was additional consideration, the government has not shown that any particular amount was allocable to such expenditures. Absent such a showing, we cannot award any amount as additional consideration for expenses of removal.

Finally, the government contends that the Kansas Reservation lands were additional consideration. With this we agree, and have indeed previously so held, *Sac and Fox Tribe* v. *United States*, 18 Ind. Cl. Comm. 558, 559 (1967) (Docket No. 219), finding of fact No. 3. We have found the value of this reservation to be $282,880.00. [393]

As our findings of fact indicate, we have determined that the consideration paid the Iowas and the Sac and Fox Indians was unconscionable as that term is used in Section 2 of the Indian Claims Commission Act.

Thus we have concluded that the total value of the Iowa portion of Cession 262 as of February 28, 1839, was $2,865,600 and that the government is entitled to a credit for payment on the claim of $81,900. We have also concluded that the Sac and Fox portion of Cession 262 was worth $12,028,800 as of February 15, 1843. The government is entitled to a credit for payment under the Treaty of October 21, 1837, of $86,071 and under the Treaty of October 11, 1842, of $1,341,446.34.

By stipulations the parties have agreed to offsets applicable and all such offsets have either been applied in full in other cases or reserved for assertion in later cases. Thus a final judgment will be entered for the Iowa Nation for $2,783,700 and for the Sac and Fox Nation for $10,601,282.66.

John T. Vance, *Commissioner*

We concur:

Jerome K. Kuykendall, *Chairman*

Richard W. Yarborough, *Commissioner*

Margaret H. Pierce, *Commissioner*

Brantley Blue, *Commissioner* [394]

BEFORE THE INDIAN CLAIMS COMMISSION

The Iowa Tribe of the Iowa Reservation In Kansas and Nebraska, et al.,

The Sac and Fox Tribe of Indians of Oklahoma, et al.,

Plaintiffs, } Docket No. 153

v.

The United States of America,

Defendant.

Decided: February 4, 1970

FINDINGS OF FACT

The Commission makes the following findings of fact which are supplemental to the findings numbered 1 through 14 previously made, 7 Ind. Cl. Comm. 98 (1959):

15. Royce Cession 262 is located in central Iowa, bounded on the south by the Iowa-Missouri line, on the east of Royce Cession 244, on the north by Royce Cession 152, and on the northwest and west by Royce Cession 151. The Cession includes 11,776,000 acres. The Iowa Nation had recognized title to a tract of 3,184,000 acres in the southwestern portion of Cession 262 ("262 South"), which is to be valued as of February 28, 1839, the effective date of the Iowa Treaty of October 19, 1838, 7 Stat. 568. The Sac and Fox Nation had recognized title to the remaining 8,592,000 acres of the Cession ("262 North"). This tract is to be valued as of February 15, 1843, the effective date of the Sac and Fox Treaty of October 11, 1842, 7 Stat. 596.

16. Cession 262 has an excellent climate for growing field [395] grain crops, especially corn, and livestock products. The average annual temperature is about 50 degrees and the summer temperatures average 70 to 75 degrees.

Precipitation averages from 30 to 36 inches, with the major part coming during the growing season. The growing season is from 150 to 170 days. At the cession dates, the climate was known to be well suited to agriculture.

Over 55% of the cession area had from 0 to 4% slope and 30% had from 5% to 13% slope. This is excellent topography for farming. Much of the cession land was well drained, although in the northwest portion of the cession a lack of natural drainage caused depressional areas or pot holes. The land however could often be farmed between the depressional areas and settlers at the valuation dates would not have seriously considered artificially draining the area.

The cession lies in the central part of the highly productive corn belt. The soils in the cession area were among the best in the country for the production of grains and grasses.

We find that the highest and best use of Cession 262 was for general farming by settlers to whom the purchaser of the tract would be expected to sell in smaller parcels. Other uses existed for small portions of the area. These included town and mill sites, hunting, fishing, trapping, grazing, mining and quarrying.

17. Many rivers and streams flow through the cession area. The Des Moines River, with its tributaries, was the principal river in the cession. The Des Moines River flows from northwest to southeast through Royce Area 262. Other important rivers in the subject tract [396] were the Skunk, Iowa, Cedar and Wapsipinicon in the Sac and Fox portion of the cession, and the Grand (also known as the Thompson) and the Chariton in the Iowa portion. Only the Des Moines was navigable for steamboats, and as of the cession dates it was in need of navigational improvements. Keelboats could operate on some of the other rivers.

The streams also provided numerous millsites which were of importance to the settlers in supplying the water power for saw and grist mills.

18. Timber was found along the rivers and streams of the cession area. We find that the settlers preferred at least to have sufficient wood to use for fences, fuel and similar needs. Thus if a prospective purchaser of the tract envisioned resale of the cession area in small parcels, the distribution as well as the quantity of wooded lands would be of importance to him in determining value.

Dr. William Murray, defendant's appraiser, tabulated the percentage of townships in which woodlands of various qualities were distributed, as follows:

In Area 262 South, for 93 townships, based on surveyors' notes: Very good or good timber—57%; Medium or fair timber—23%; Poor or no timber—20%. For 52 additional townships, based on survey plats: Large amount of timber—33%; Average amount of timber—34%; Little timber—33%.

In Area 262 North, for 271 townships, based on surveyors' notes: Very good or good timber—37%; Medium or fair timber—34%; Poor or no [397] timber—29%. For 117 additional townships, based on end-of-mile comments: Large amount of timber—17%; Average amount of timber—32%; Little or no timber—51%.

Drs. Raleigh Barlowe and Conrad H. Hammer, in their valuation report made for plaintiffs, calculated that some timber was found in 93.3% of the townships in the cession area for which surveyor's notes and comments are available.

19. It was known as of the valuation dates that there were significant deposits of coal in Cession 262. During the early years of settlement drift mining predominated. Surface outcroppings of coal usually occurred along banks of rivers and streams, the same areas in which timber was most plentiful. This plentiful supply of timber for fuel thus limited early mining activities.

At the valuation dates, the cession areas were also known to contain deposits of limestone and sandstone which were useful for building purposes. Gypsum and iron ore were also known to be present in parts of cession 262 North.

20. In the 1830's and 1840's the nation experienced successive prosperity-depression-revival periods in its economy. Willard Long Thorp, in a book entitled *Business Annals* published by the National Bureau of Economic Research described the economic conditions as of the cession dates as follows:

> 1839 Revival [from the 1837-38 depression]; panic; recession. Continued improvement; revival of land speculation early in year; rapid decline to depression, autumn; many failures; commodity prices collapse after rapid rise; recovery in foreign trade. [398]
>
> Further resumption led by United States Bank, January; money market tightens to panic and bank failures, October; specie payment again suspended, except New England and New York, last quarter.
>
> Excellent wheat harvest, record cotton crop, prices collapse.
>
> War with England over boundary threatened, January.
>
> • • •
>
> 1843 Depression [which began in 1839-40 continues]; revival. Inactivity gradually yields to improvement, summer, except in south; commodity prices reach low point and improve, autumn; excellent exports, small import trade.
>
> Money easy; active speculation, security prices advancing to July.

Good cereal crops, especially corn; poor cotton yield; very low wheat price.

Thus, as of February 28, 1839, general economic conditions had improved after the 1837-1838 depression. As of February 15, 1843, a long depression continued with some signs of revival appearing in the easing of the money supply and the advance of securities prices.

21. At the valuation dates, the minimum cash price for government lands was $1.25 per acre. In practice this became the maximum cash price as well. Preemption laws, "claim clubs" to prevent the bidding up of prices, and the large supply of public lands resulted in $1.25 becoming the standard price for government lands, even though all lands, except those subject to preemption claims, were offered at public auction. The average sales price for public lands in Iowa from 1838 through 1843 was $1.25 in every year except 1847, when it was [399] $1.26. On August 15, 1836, Jackson's specie circular went into effect. After that date, all cash payments to government land offices were required to be in gold or silver coins or in authorized paper currency, thus eliminating the use of state bank notes of questionable value.

Land could also be purchased through the use of military land warrants. Between 1847 and 1855 Congress granted warrants for almost 61,000,000 acres to veterans and a market for them quickly developed. Until March 1852, warrant prices remained extremely low because of difficulties in transferring them. At that date Congress made all previously issued and future warrants assignable.

In 1847, Congress gave each veteran the option of $100 in treasury scrip or a 160 acre warrant. Few chose scrip, but this tended to put a floor of 62½ cents per acre on the price of land warrants, although reports exist of sales as low as $30 for 160 acre warrants in 1849.

Reputable brokerage firms on the east coast soon controlled and regularized the land warrant market. Warrants could be sold for cash in the West at an advance above New York prices. The purchase of warrants also involved the payment of a brokerage fee, a land office fee and a real estate agent's fee. These added approximately 10 cents per acre to the cost of land. The New York prices per acre for land warrants were quoted as follows:

Years	High	Low
1848-1850	$ .88¾	$.62½
1851-1852	.96⅞	.62½
1853-1854	1.20	.91⅞
1855-1856	1.16½	.85
1857-1858	1.05	.60
1859-1860	.96	.60 [400]

Exclusive of lands granted to the state and to railroads, 52.4% of the land in the state of Iowa was entered through land warrants.

22. The minimum price for government land of $1.25 per acre had emerged as a compromise between those members of Congress who believed that the government should sell lands as a prime revenue raising measure, and those who believed that public lands should be turned over to the settlers free of charge or at a nominal price. The government price of $1.25 per acre was the same for the finest and for the worst lands.

23. The first townships were proclaimed for sale in the cession area in 1845. More than half of the cession area was proclaimed for sale by the end of 1848, and 80% was offered by 1850. By 1854, all but six townships (offered in 1858), had been offered for sale.

Comparatively little land was sold from 1845 through 1852. At the end of 1852, 22.5% of the sales in 262 South

and 19.9% of those in 262 North had taken place. The years 1853 through 1856 brought the largest numbers of sales, with 1854 and 1855 being peak periods. From 1853 through 1856, 75.8% of the sales in 262 South and the same percentage in 262 North took place. The remainder of the sales were completed by the end of 1860.

24. In 1840, there were 18,370,000 acres of unsold public land in Missouri, 13,936,000 acres in Illinois and 112,646,000 acres in the entire United States. With land selling at a uniform price, comparative value may be gauged by the rapidity of sale. Drs. Raleigh Barlowe and Conrad H. Hammer, witnesses for plaintiffs, mapped for each [401] township in the cession the number of years which elapsed from the time each was put on sale (1845 to 1858) until 90% of the privately acquired land in the township was sold. Of the 527 townships in the cession area, approximately 80 were 90% or more sold in less than four years. Many of these were among the last offered townships in the western part of 262 North. Most of the townships along the Des Moines River, some along the Iowa River, those on the northern border of 262 North, and the great majority of those in 262 South were 90% sold in four to seven years. Over half the townships in the cession were 90% sold in less than seven years. Almost all the remaining townships, in the eastern and northcentral part of 262 North and some in 262 South, were sold to the 90% level in seven to ten years. Only eleven townships, in the north and west of 262 North, required more than ten years to reach the 90% sale level.

By comparison, in 1840, 8,341,000 acres of the unsold public land in Missouri, 5,271,000 acres of such land in Illinois, and 60,421,000 acres of such land in the entire United States had been on the market for over ten years. In 1854, the Graduation Act, 10 Stat. 574, provided for a reduc-

tion of land prices from $1.25 to $1.00 per acre for lands remaining on the market for ten years or more, and further reductions at five year intervals to 12½ cents per acre after 30 years.

25. As of the cession dates, a purchaser would estimate his return on investment by examining resales of lands in eastern Iowa (Royce Areas 175, 226, and 224). A purchaser would know that while the [402] eastern Iowa lands were generally comparable to those in Cession 262, the eastern lands had certain advantages not enjoyed by the lands further west. Much of eastern Iowa was located along the Mississippi River which was a very important commercial route at that time. The eastern counties were also closer to the population centers of the East and South than the lands in Cession 262. Eastern Iowa had more timber than Cession 262; it also had a slightly longer growing season and received more precipitation. Cession 262 had fewer steep lands than eastern Iowa, but it had drainage problems and problems with pot holes in the northwest portion which eastern Iowa did not have. A purchaser might have thought the soil in Cession 262 to be slightly more productive than that in Eastern Iowa because of the dark color of the Webster soils in the northwest, although little difference in soil fertility seems actually to exist on the average between the two areas.

Drs. Raleigh Barlowe and Conrad H. Hammer, witnesses for plaintiffs, assembled information on resales of land in eastern Iowa. In one tabulation they examined resales for the counties of Cedar, Delaware, Des Moines, Jackson, Van Buren and Washington. Eliminating sales under $1.26 as partial financing and those over $5.00 as representing improved land, they obtained the following results for average resale prices in the six county area: 1838—$2.33; 1839—$2.65; 1840—$2.63; 1841—$2.60; 1842—$2.82; 1843—$2.96.

Drs. Barlowe and Hammer also used another method to adjust these resale figures for improvements. The Census of 1900 showed that improvements in the 19 eastern Iowa counties accounted for 16.7% to [403] 22.3% of farm real estate values. By deducting 20% from resale prices, after elimination of transactions which seem to involve partial financing arrangements, resale values per acre for the six county sample are $2.88 in 1839, $2.98 in 1840, $2.55 in 1841, $2.85 in 1842 and $2.98 in 1843.

As an additional method of adjusting for improvements, Drs. Barlowe and Hammer examined the Census of 1850 which first reported on the amount of improved land in eastern Iowa. They then eliminated the highest sales roughly in proportion to the amount of improvements, as well as eliminating all sales of $1.00 or less per acre as representing partial financing arrangements or other situations untypical of bona fide sales. For five counties bordering on Cession 262, the following results were reached:

% improved land shown in 1850 census; by county:

Van Buren	19.33%
Jefferson	19.50%
Washington	6.85%
Johnson	6.38%
Linn	8,16%
AVERAGE	12.44%

Year	% Acreage removed—Sales over $5.00	Per Acre value	% Acreage removed—Sales over $4.00	Per Acre value
1839	11.2	$2.31	18.8	$2.08
1840	12.3	2.33	22.8	2.00
1841	6.2	2.37	13.5	2.16
1842	11.6	2.82	29.2	2.38
1843	11.3	2.38	21.6	2.06

26. Dr. Robert P. Swierenga, plaintiffs' witness, found that ten large investors entered 14.2% of the land in

eastern Iowa. Resales by these persons during the years 1838 to 1842 in eight counties in [404] eastern Iowa averaged $2.19 per acre. Dr. Swierenga also found that investors acquiring 1,000 or more acres in Cession 262 who also had holdings in eastern Iowa sold 5,779 acres in the eastern counties between 1838 and 1842 at an average price of $3.21 per acre.

27. It appears that in fact resale prices in Cession 262 were higher than the resales for Eastern Iowa would have indicated. Through the use of electronic data processing methods, Dr. Swierenga tabulated resales of 460,000 acres in nine counties in Cession 262 by persons who had originally entered 1,000 acres or more in the entire cession area. The resales occurred between 1846 and 1889, with 98.5% of the resales occurring before 1871. He found that the land was held by such persons for an average of 31.6 months before resale and was sold by them at an average of $3.10 per acre. He computed that the net rate of return to these investors averaged 53.42%. This is not, however, the profit of the investor since, as Dr. Swierenga points out, it makes no allowance for an interest rate to the invested capital nor for the time spent by the investor in managing his real estate. Defendant's expert witness, Dr. William Murray, reports that commercial paper rates in February 1839 were 6% to 9% and in February 1843 were 5% to 6%. Rates by November 1839 went as high as 36% and in June 1843 went as low as 2½% to 3%.

Results of these resales in Cession 262 would not have been known to a purchaser as of the valuation date of either portion of the tract, and thus can be regarded only as hindsight information which can be used only to corroborate findings of value based on [405] information known as of the valuation date.

28. Defendant's expert witness, Dr. William G. Murray, reviewed factors such as location, population, topography, resources, climate, transportation, economic factors and public land sales in comparison areas. He did not consider private resale transactions because he was unable to determine the extent of improvements on the lands. His valuation of Area 262 South was as follows:

15% of tract most accessible to Des Moines River—90¢ per acre

35% of tract in Des Moines River basin—40¢ per acre

50% of tract principally in Grand and Chariton River basins—25¢ per acre.

Average value for entire 262 South—40¢ per acre.

His valuation for 262 North was as follows:

10% of tract near Des Moines River—$1.45 per acre

20% of tract near rivers and/or timber—95¢ per acre

60% of tract, open prairie—25¢ per acre

10% of tract, wet, marshy or steep lands—15¢ per acre.

Average value for entire 262 North—50¢ per acre.

29. As of February 28, 1839, a purchaser of Area 262 South could not have anticipated rapid settlement of the Area. Immediately to the west lay several million acres (Royce Cessions 151 and 256, which overlap to a large extent) which were used for hunting by the Yankton Sioux, Omaha, Otoe, Iowa and Sac and Fox. See, *Otoe and Missouria Tribe* v. *United States,* 5 Ind. Cl Comm. 316 (1957). In addition the United Nation of Chippewa, Ottawa and Potawatomi had been granted a 5 million acre tract of this land in 1833. See, *Prairie Band of* [406] *Potawatomi Indians, et al.,* v. *United States,* 4 Ind. Cl. Comm. 409 (1956). Beginning in 1836, even though all the United Nation members had not completed their move to western Iowa, the government initiated attempts at a second removal south-

west of the Missouri River. *Prairie Band of Potawatomi, id.* at 426. This removal was not effected until 1846.

Directly to the south of 262 South lay lands ceded by the Iowa Nation in 1824. See, *Iowa Tribe et al.,* v. *United States,* 6 Ind. Cl. Comm. 464 (1958), aff'd. in part and reversed in part 179 Ct. Cl. 8, 383 F. 2d 991 (1967), *cert. denied,* 389 U.S. 900 (1967). The pattern of settlement in Missouri however was such that this area was first settled in the middle and late 1830's. See, *Iowa Tribe et al.,* v. *United States,* 12 Ind. Cl. Comm. 487, 499 (1963), aff'd. in part and reversed in part 179 Ct. Cl. 8, 383 F. 2d 991 (1967), *cert. denied,* 389 U.S. 900 (1967).

To the north and east of Area 262 South lay Area 262 North. A purchaser would probably have known that a cession by the Sac and Fox who owned this area would be one of the necessary prerequisites to the rapid settlement of 262 South. He would also have known that the government had encountered difficulties in negotiating a treaty with the Sac and Fox to cede the area. Reporting his negotiations which led to the Treaty of September 28, 1836, 7 Stat. 520, with the Sac and Fox, Treaty Commissioner Dodge wrote to the Commissioner of Indian Affairs as follows (Pet. Ex. A-3): [407]

> "The Sac and Fox Indians would not consent to a proposition I made them to sell their Country and remove South of the Missouri River. The Chiefs and principal men of these nations are under the belief that their Country is to become immensely valuable; and I have no doubt their traders were the means of preventing their selling more of their Country at the Treaty I made with them. It is inconvenient for traders to follow the Indians South of the Missouri River."

A purchaser would know that 25,000 to 30,000 people lived in Eastern Iowa at the valuation date of 262 South.

He would know that land in 48 townships of Cession 175 had been offered for sale in 1838. By the end of 1838, 25% of this land had been sold including 46% of the land offered in the southern portion. Another 12% of the 48 townships was sold in 1839. As of February 28, 1839, less than one-third of the land in the southern portion had yet been offered for sale.

30. As of February 15, 1843, a purchaser of Area 262 North would know that the cession by the Sac and Fox opened a vast area in central Iowa although the Sac and Fox retained the right to occupy the western portion of the Cession, comprising over half of Cession 262, until 1845, Treaty of October 11, 1842, 7 Stat. 596. He would know that the population of Iowa had grown to approximately 55,000 to 60,000. He would know that land in some 205 townships in eastern Iowa had been placed on the public land market, although it was 1843 before any land in Cession 244, immediately to the east of Cession 262, was offered. In addition, a purchaser would know that through 1842, 32% of the land in the 205 townships offered prior to 1843 had been sold. In the 79 southern townships, 67% of the land had been sold. Virtually [408] all the land in the southern area except for Cession 244 had been offered for sale.

31. At the cession dates, the people in eastern Iowa thought the lands in Cession 262 to be highly desirable and productive. A number of settlers rushed into the eastern and western portions of the cession areas at the respective dates when they were opened for settlement. Indeed a number of squatters had established claims prior to government survey of the areas.

The comparatively heavy population in the southern part of eastern Iowa would lead a purchaser to believe that the course of movement into Cession 262 would be along the

Des Moines River and other rivers which flowed into the southern part of eastern Iowa from the cession area.

32. For the reasons indicated in our opinion, we find the value of the 3,184,000 acres in 262 South to be $2,865,600 or an average of 90¢ per acre. We find the value of the 8,592,000 acres in 262 North to be $12,028,000 or an average of $1.40 per acre.

33. The Iowa Treaty of October 19, 1838, 7 Stat. 568, ceded the Iowa Tribe's interest in Royce Areas 175, 226, 244 and 262. An award for the first three of these areas was made in *The Sac and Fox Tribe et al.*, v. *United States,* 20 Ind. Cl. Comm. 439 (1969). Finding of fact No. 52 in that case stated in part:

> "The total consideration paid to the Iowa Nation under the 1838 Iowa treaty was $162,500 of which amount $80,600 is allocable to the Iowa interests in the three cession areas." 20 Ind. Cl. Comm. 439, 501 (1969).

The remainder of this consideration, amounting to $81,900, is [409] allocable to Cession 262. Such consideration is unconscionable under the Indian Claims Commission Act.

34. The Sac and Fox Nation ceded all its right, title and interest to Cession 262 under two treaties. The first of these, with the Sac and Fox of Missouri dated October 21, 1837, 7 Stat. 543, provided for consideration of $160,000 in payment for their interest in Royce Cessions 175, 226, 244 and 262. Pursuant to the stipulation for entry of final judgment in Docket 138 which was approved and entered by the Commission, *Otoe and Missouria Tribe* v. *United States,* 15 Ind. Cl. Comm. 42, 46 (1965), it was provided that "140,800 of the sum paid to the Sac and Fox of the Missouri" under this treaty "is to be accredited to the government on account of payments for Royce Cessions 175, 226, 244 and 262 and allocated in Dockets numbered 158, 209,

231 and 153." The Commission has previously credited to the government $54,729 on account of payments for Royce Cessions 175 and 244, *The Sac and Fox Tribe et al.*, v. *United States*, 20 Ind. Cl. Comm. 439, 493, 499-500 (1969). The Commission found that $1,056 was allocable to Cession 226, *id.*, 20 Ind. Cl. Comm. 439, 497 (1969), but did not credit this to the Government since it found that full value was paid for Cession 226. Thus $86,071 remains to be credited to the government in this docket.

35. The second treaty with the Sac and Fox Nation was made with the Sac and Fox Indians and dated October 11, 1842, 7 Stat. 596. It provided in part as follows: [410]

ARTICLE II

> In consideration of the cession contained in the preceding article, the United States agree to pay annually to the Sac and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars, and to pay their debts mentioned in the schedule annexed to and made part of this treaty, amounting to the sum of two hundred and fifty-eight thousand, five hundred and sixty-two dollars and thirty four cents; and the United States also agree,
>
> *First,* That the President will as soon after this treaty is ratified on their part as may be convenient, assign a tract of land suitable and convenient, for Indian purposes, to the Sacs and Foxes for a permanent and perpetual residence. . . .
>
> *Second,* That the United States will [provide certain blacksmith and gunsmith supplies and services].
>
> *Third,* That the President of the United States will [cause a line to be run between the land which the Sac and Fox reserved the right to occupy for three years and ceded lands opened to white settlement].

For the reasons indicated in our opinion, we have found that the payments described as interest of 5% on $800,000

were intended to be a perpetual annuity and that credit should be allowed for consideration of $800,000 by reason of this provision.

36. Under the Treaty of October 11, 1842, certain expenditures were to be made out of annuities payable to the tribe. Under Article II Second

> ". . . all expenses attending the removal of the tools, iron and steel, and the erection of new shops, and the purchase of iron and steel, and the support and maintenance of the shops, and wages of the smiths and their assistants, are to be paid by the tribe, except such portion thereof as they are now entitled to have paid by the United States, under [certain previous treaties.]

Under Article III, the Sac and Foxes agree to move first to the western [411] portion of the cession and then to their new residence lands,

> "and that if they do not remove before the expiration of the term of three years, they will then remove at their own expense; and the United States agree, that . . . a quantity of provisions sufficient for their subsistence while removing, shall be furnished them at their agency, and an additional quantity, not exceeding one years supply shall be delivered to them upon their arrival upon the lands assigned them; the cost and expenses of which supplies shall be retained out of any money payable to them by the United States."

Reviewing the Treaty, we find that the only items of consideration for this cession to be received by the Sacs and Foxes besides the annuity were (1) the new residence lands, (2) the payment of debts, (3) the running of a line marking their temporary residence lands, and (4) perhaps expenses of removal (but not of provisions for subsistence) under Article III. In the Report of the General Accounting Office no expenditure which may be identified as the running of the above line is found and expenditures for removal

cannot be separated from those for subsistence for which the Sacs and Foxes themselves were to be charged. Thus the government may receive additional credit for $258,566.34 which was the amount of debts paid pursuant to Article II and for the reservation lands in Kansas given to the Sacs and Foxes.

37. The tract selected for the Sac and Fox Reservation pursuant to the 1842 Treaty, and to which the Sac and Fox removed in 1845 and 1846, was not officially surveyed until after they had settled on it. Subsequently, it was discovered that the Sac and Fox Reservation overlapped 90,000 acres of the northwest corner of the Pottawatomi Reservation (Royce Area 266). By the treaty of cession of June 5, and 17, 1846, 9 Stat. 853, with the Pottawatomi Nation, the United States [412] cleared the title to the overlap area in favor of the Sac and Fox Indians. In *Prairie Band of Pottawatomi Indians* v. *United States,* 4 Ind. Cl. Comm. 409 (1956) we found the fair market value of a 909,565.62 acre tract which included the 90,000 acre overlap to be 65¢ per acre in June 1846. We find this to be an accurate reflection of the per acre value of the entire Kansas Reservation at the date it was received by the Sac and Fox.

Thus the total consideration paid by the United States under the Treaty of October 11, 1842, was as follows:

Annuity	$800,000.00
Debts paid	258,566.34
Kansas Reservation (435,200 acres at 65¢ per acre)....	282,880.00
	$1,341,446.34

38. We also find that the consideration paid the Sac and Fox under the Treaties of October 21, 1837, and October 11, 1842, was unconscionable under the Indian Claims Commission Act.

39. On July 19, 1961, a stipulation between the Sac and Fox Tribes and defendant was filed with the Commission, agreeing to a compromise of offsets in the amount of $35,000 for the period from November 2, 1804, to June 30, 1960, in dockets including 153. The stipulated offsets were applied in full in Docket No. 138, 15 Ind. Cl. Comm. 42, 47, 65 (1965). On February 5, 1964, a stipulation between the Iowa Tribes and defendant was filed with the Commission, agreeing to a compromise of offsets in the amount of $45,000 for the period from August 4, 1824, to June 30, 1956, in Dockets including 153. The stipulated [413] offsets were applied in full in Docket No. 135, 15 Ind. Cl. Comm. 248, 249, 265 (1965). The defendant has made no claim for offsets of gratuities subsequent to June 30, 1960, as to the Sac and Fox Tribes and subsequent to June 30, 1956, as to the Iowa Tribes, but has reserved such offsets for any other claims of the petitioners.

On the basis of these stipulations, we find that the judgment in this value stage of this claim shall be the final judgment.

Based on all the evidence, we find that the Iowa Nation is entitled to recover the following amount:

Value of "262 South"	$2,865,600
Less consideration received	81,900
	$2,783,700

The Sac and Fox Nation is entitled to recover the following amount:

Value of "262 North"	$12,028,800.00
Less consideration received	
1837 Treaty	86,071.00
1842 Treaty	1,341,446.34
	$10,601,282.66

John T. Vance, *Commissioner*

We concur:

Jerome K. Kuykendall, *Chairman*

Richard W. Yarborough, *Commissioner*

Margaret H. Pierce, *Commissioner*

Brantly Blue, *Commissioner* [414]

BEFORE THE INDIAN CLAIMS COMMISSION

The Iowa Tribe of the Iowa Reservation In Kansas and Nebraska, et al.,

The Sac and Fox Tribe of Indians of Oklahoma, et al.,

Plaintiffs,

v.

The United States of America,

Defendant.

Docket No. 153

FINAL AWARD

Upon the findings of fact and opinion this day filed herein and which are hereby made a part of this order, the Commission concludes as a matter of law that:

a. The fair market value of the lands ceded by the Iowa Nation was $2,865,600 as of February 28, 1839. The Iowa Nation received $81,900 in consideration for the cession. The consideration received was unconscionable.

b. The fair market value of the lands ceded by the Sac and Fox Nation was $12,028,800 as of February 15, 1843. The consideration received by the Sac and Fox for their lands was unconscionable. The government is entitled to a credit for payment under the Treaty of October 21, 1837, 7 Stat. 543, of $86,071 and under the Treaty of October 11, 1842, 7 Stat. 596, of $1,341,446.34.

c. Gratuitous offsets applicable have either been applied in full in other cases or reserved for assertion in later cases.

d. The Iowa Nation is entitled to recover $2,783,700. The Sac and Fox Nation is entitled to recover $10,601,282.66.

IT IS THEREFORE ORDERED that plaintiff Iowa Nation shall have and recover from defendant as a final judgment $2,783,700 and that plaintiff Sac and Fox Nation shall have and recover from defendant as a final judgment $10,601,282.66. [415]

Dated at Washington, D. C., this 4th day of February, 1970.

Jerome K. Kuykendall, *Chairman*

John T. Vance, *Commissioner*

Richard W. Yarborough, *Commissioner*

Margaret H. Pierce, *Commissioner*

Brantley Blue, *Commissioner* [416]

TREATY WITH THE SAUK AND FOXES, 1832.

Articles of a Treaty of Peace, Friendship and Cession, concluded at Fort Armstrong, Rock Island, Illinois, between the United States of America, by their Commissioners, Major General Winfield Scott, of the United States Army, and his Excellency John Reynolds, Governor of the State of Illinois, and the confederated tribes of Sac and Fox Indians, represented, in general Council, by the undersigned Chiefs, Headmen and Warriors.

WHEREAS, under certain lawless and desperate leaders, a formidable band, constituting a large portion of the Sac and Fox nation, left their country in April last, and, in violation of treaties, commenced an unprovoked war upon unsuspecting and defenceless citizens of the United States, sparing neither age nor sex; and whereas, the United States, at a great expense of treasure, have subdued the said hostile band, killing or capturing all its principal Chiefs and Warriors—the said States, partly as indemnity for the expense incurred, and partly to secure the future safety and tranquility of the invaded frontier, demand of the said tribes, to the use of the United States, a cession of a tract of the Sac and Fox country, bordering on said frontier, more than proportional to the numbers of the hostile band who have been so conquered and subdued.

ARTICLE I. Accordingly, the confederated tribes of Sacs and Foxes hereby cede to the United States forever, all the lands to which the said tribes have title, or claim, (with the exception of the reservation hereinafter made,) included within the following bounds, to wit: Beginning on the Mississippi river, at the point where the Sac and Fox northern boundary line, as established by the second article of the

treaty of Prairie du Chien, of the fifteenth of July, one thousand eight hundred and thirty, strikes said river; thence, up said boundary line to a point fifty miles from the Mississippi, measured on said line; thence, in a right line to the nearest point on the Red Cedar of the Ioway, forty miles from the Mississippi river; thence, in a right line to a point in the northern boundary line of the State of Missouri, fifty miles, measured on said boundary, from the Mississippi river; thence, by the last mentioned boundary to the Mississippi river, and by the western shore of said river to the place of beginning. And the said confederated tribes of Sacs and Foxes hereby stipulate and agree to remove from the lands herein ceded to the United States, on or before the first day of June next; and, in order to prevent any future misunderstanding, it is expressly understood, that no band or party of the Sac or Fox tribes shall reside, plant, fish, or hunt on any portion of the ceded country after the period just mentioned.

Article II. Out of the cession made in the preceding article, the United States agree to a reservation for the use of the said confederated tribes, of a tract of land containing four hundred square miles, to be laid off under the directions of the President of the United States, from the boundary line crossing the Ioway river, in such manner that nearly an equal portion of the reservation may be on both sides of said river, and extending downwards, so as to include Ke-o-kuck's principal village on its right bank, which village is about twelve miles from the Mississippi river.

Article III. In consideration of the great extent of the foregoing cession, the United States stipulate and agree to pay to the said confederated tribes, annually, for thirty

successive years, the first payment to be made in September of the next year, the sum of twenty thousand dollars in specie.

Article IV. It is further agreed that the United States shall establish and maintain within the limits, and for the use and benefit of the Sacs and Foxes, for the period of thirty years, one additional black and gun smith shop, with the necessary tools, iron and steel; and finally make a yearly allowance for the same period, to the said tribes, of forty kegs of tobacco, and forty barrels of salt, to be delivered at the mouth of the Ioway river.

Article V. The United States, at the earnest request of the said confederated tribes, further agree to pay to Farnham and Davenport, Indian traders at Rock Island, the sum of forty thousand dollars without interest, which sum will be in full satisfaction of the claims of the said traders against the said tribes, and by the latter was, on the tenth day of July, one thousand eight hundred and thirty-one, acknowledged to be justly due, for articles of necessity, furnished in the course of the seven preceding years, in an instrument of writing of said date, duly signed by the Chiefs and Headmen of said tribes, and certified by the late Felix St. Vrain, United States' agent, and Antoine Le Claire, United States' Interpreter, both for the said tribes.

Article VI. At the special request of the said confederated tribes, the United States agree to grant, by patent, in fee simple, to Antoine Le Claire, Interpreter, a part Indian, one section of land opposite Rock Island, and one section at the head of the first rapids above said Island, within the country herein ceded by the Sacs and Foxes.

Article VII. Trusting to the good faith of the neutral bands of Sacs and Foxes, the United States have already delivered up to those bands the great mass of prisoners

made in the course of the war by the United States, and promise to use their influence to procure the delivery of other Sacs and Foxes, who may still be prisoners in the hands of a band of Sioux Indians, the friends of the United States; but the following named prisoners of war, now in confinement, who were Chiefs and Headmen, shall be held as hostages for the future good conduct of the late hostile bands, during the pleasure of the President of the United States, viz:—Muk-ka-ta-mish-a-ka-kaik (or Black Hawk) and his two sons; Wau-ba-kee-shik (the Prophet) his brother and two sons; Na-pope; We-sheet Ioway; Pamaho; and Cha-kee-pa-shi-pa-ho (the little stabbing Chief).

Article VIII. And is it further stipulated and agreed between the porties to this treaty, that there shall never be allowed in the confederated Sac and Fox nation, any separate band, or village, under any chief or warrior of the last hostile bands; but that the remnant of the said hostile bands shall be divided among the neutral bands of the said tribes according to blood—the Sacs among the Sacs, and the Foxes among the Foxes.

Article IX. In consideration of the premises, peace and friendship are declared, and shall be prepetually maintained between the United States and the whole confederated Sac and Fox nation, excepting from the latter the hostages before mentioned.

Article X. The United States, besides the presents, delivered at the signing of this treaty, wishing to give a striking evidence of their mercy and liberality, will immediately cause to be issued to the said confederated tribes, principally for the use of the Sac and Fox women and children, whose husbands, fathers and brothers, have been killed in the late war, and generally for the use of the whole confederated tribes, articles of subsistence as follows:—thirty-five beef cattle; twelve bushels of salt; thirty barrels

of pork; and fifty barrels of flour, and cause to be delivered for the same purposes, in the month of April next, at the mouth of the lower Ioway, six thousand bushels of maize or Indian corn.

Article XI. At the request of the said confederated tribes, it is agreed that a suitable present shall be made to them on their pointing out to any United States agent, authorized for the purpose, the position or positions of one or more mines, supposed by the said tribes to be of a metal more valuable than lead or iron.

Article XII. This treaty shall take effect and be obligatory on the contracting parties, as soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

Done at Fort Armstrong, Rock Island, Illinois, this twenty-first day of September, in the year of our Lord one thousand eight hundred and thirty-two, and of the independence of the United States the fifty-seventh.

Winfield Scott,
John Reynolds.
Sacs.
Kee-o-kuck, or he who has been every where, his x mark,
Pa-she-pa-ho, or the stabber, his x mark,
Pia-tshe-noay, or the noise maker, his x mark,
Wawk-kum-mee, or clear water, his x mark,
O-sow-wish-kan-no, or yellow bird, his x mark,
Pa-ca-tokee, or wounded lip, his x mark,
Winne-wun-quai-saat, or the terror of man, his x mark,
Mau-noa-tuck, or he who controls many, his x mark,
Wau-we-au-tun, or the curling wave, his x mark,
Foxes.
Wau-pel-la, or he who is painted white, his x mark,
Tay-wee-mau, or medicine man, (strawberry,) his x mark,
Pow-sheek, or the roused bear, his x mark,
An-nau-mee, or the running fox, his x mark,
Ma-tow-e-qua, or the jealous woman, his x mark,
Me-shee-wau-quaw, or the dried tree, his x mark,
May-kee-sa-mau-ker, or the wampum fish, his x mark,
Chaw-co-saut, or the prowler, his x mark,
Kaw-kaw-kee, or the crow, his x mark,

Mau-que-tee, or the bald eagle, his x mark,
Ma-she-na, or cross man, his x mark,
Kaw-kaw-ke-monte, or the pouch, (running bear,) his x mark,
Wee-she-kaw-k-a-skuck, or he who steps firmly, his x mark,
Wee-ca-ma, or good fish, his x mark,
Paw-qua-nuey, or the runner, his x mark,
Ma-hua-wai-be, or the wolf skin, his x mark,
Mis-see-quaw-kaw, or hairy neck, his x mark,

[illegible] skin, his x mark,
[illegible], or broken [illegible] x mark,
Nau-nah-que-kee-shee-ko, or between two days, his x mark,
Paw-puck-ka-kaw, or stealing fox, his x mark,
Tay-e-sheek, or the falling bear, his x mark,
Wau-pee-maw-ker, or the white loon, his x mark,
Wau-co-see-nee-me, or fox man, his x mark.

In presence of—

R. Bache, captain ordnance, secretary to the commission,
Abrm. Eustis,
Alex. Cummings, lieutenant-colonel Second Infantry,
Alex. R. Thompson, major U. S. Army,
Sexton G. Frazer,
P. H. Galt, Assistant Adjutant-General,
Benj. F. Pike,
Wm. Henry,
James Craig,
John Aukeney,
J. B. F. Russell,
Isaac Chambers,
John Clitz, adjutant infantry,
John Pickell, lieutenant Fourth Artillery,
A. G. Miller, lieutenant First Infantry,
Geo. Davenport, assistant quartermaster-general Illinois Militia,
A. Drane,
Æneas Mackay, captain U. S. Army,
J. R. Smith, first lieutenant Second Infantry,
Wm. Maynadier, lieutenant and aid-de-camp,
J. S. Gallagher, first lieutenant, acting commissary subsistence,
N. B. Bennett, lieutenant Third Artillery,

B. Riley, major U. S. Army,
H. Dodge, major,
W. Campbell,
Hy. Wilson, major Fourth U. S. Infantry,
Donald Ward,
Thos. Black Wolf,
Horatio A. Wilson, lieutenant Fourth Artillery,
H. Day, lieutenant Second Infantry,
Jas. W. Penrose, lieutenant Second Infantry,
J. E. Johnston, lieutenant Fourth Artillery,
S. Burbank, lieutenant First Infantry,
J. H. Prentiss, lieutenant First Artillery,
L. J. Beall, lieutenant First Infantry,
Addison Philleo,
Thomas L. Alexander, lieutenant Sixth Infantry,
Horace Beale, acting surgeon U. S. Army,
Oliver W. Kellogg,
Jona Leighton, acting surgeon U. S. Army,
Robt. C. Buchanan, lieutenant Fourth Infantry,
Jas. S. Williams, lieutenant Sixth Infantry,
John W. Spencer,
Antoine Le Claire, interpreter.

TREATY WITH THE SAUK AND FOXES, 1836.

Articles of a treaty made and entered into at the treaty ground on the right bank of the Mississippi river in the county of Debuque and Territory of Wisconsin opposite Rock island, on the twenty-eighth day of September one thousand eight hundred and thirty-six, between Henry Dodge commissioner on the part of the United States, of the one part, and the confederated tribes of Sac and Fox Indians represented in general council by the undersigned chiefs, headmen and warriors of the said tribes, of the other part:

WHEREAS by the second article of the treaty made between the United States and the confederate tribes of the Sac and Fox Indians on the twenty-first day of September one thousand eight hundred and thirty-two, a reservation of four hundred sections of land was made to the Sac and Fox Indians to be laid off under the directions of the President of the United States in conformity to the provisions of said article, and the same having been so subsequently laid out accordingly, and the confederated tribes of Sacs and Foxes being desirous of obtaining additional means of support, and to pay their just creditors, have entered into this treaty, and make the following cession of land.

ARTICLE 1. The confederated tribes of Sacs and Foxes for the purposes above expressed, and for and in consideration of the stipulations and agreements hereinafter expressed, do hereby cede to the United States forever, the said reservation of four hundred sections of land as designated in the second article of the treaty made between the United States and the confederated tribes of Sacs and Foxes as the same has been surveyed and laid off by order of the President of the United States.

ARTICLE 2. In consideration of the cession contained in the preceding article, the United States hereby agree as

follows, to wit: To pay to the confederated tribes of the Sac and Fox Indians in the month of June one thousand eight hundred and thirty-seven, the sum of thirty thousand dollars, and for ten successive years thereafter the sum of ten thousand dollars each year in specie, to be paid at the treaty ground opposite Rock island or such other place as may be designated by the President of the United States, to pay to the widow and children of Felix St. Vrain deceased former Indian agent who was killed by the Indians, one thousand dollars: to pay to the following named persons the sums set opposite to their names respectively, being the one half of the amount agreed to be due and owing by the confederated tribes of Sacs and Foxes to their creditors, provided said creditors will wait for the other half until the same can be paid out of their annuities, for which purpose the Sacs and Foxes will set apart the sum of five thousand dollars each year, beginning in one thousand eight hundred and thirty-eight, out of their annuities to be paid upon said debts in the proper proportion untill the whole amount is discharged: to wit: to John Campbell ten thousand dollars, to Jeremiah Smith six hundred and forty dollars, to Stephen Dubois three hundred and five dollars and twenty cents, to Nathaniel Knapp one hundred dollars, to Wharton R. McPhearson two hundred and fifty dollars, to S. S. Phelps & Co. four thousand dollars, to Jesse W. Shull five hundred dollars, to James Jordan one hundred and fifty dollars, to John R. Campbell fifteen dollars, to Amos Farrar one hundred dollars, to the owners of the S. boat Warrior, one hundred and sixty-two dollars and seventy-five cents, to George Davenport two thousand five hundred and sixty-three dollars and fifty cents, to Madame St. Ament five hundred dollars, to Madame Joseph Gunville five hundred dollars, to Madame Le Claire one hundred and twenty-five dollars, to Miss Blondeau one hundred and twenty-five dollars, to Antoine Le Claire two thousand four hundred

and thirty-six dollars and fifty cents, to Francis Labachiere one thousand one hundred and sixty-seven dollars and seventy-five cents, to Pratte Chouteau & Co. twenty thousand three hundred and sixty-two dollars, and forty-two and a half cents, to Nathaniel Patterson four hundred and fifty-six dollars. The Iowa Indians having set up a claim to a part of the lands ceded by this treaty, it is therefore hereby provided, that the President of the United States shall cause the validity and extent of said claim to be ascertained, and upon a relinquishment of said claim to the United States, he shall cause the reasonable and fair value thereof to be paid to said Iowa Indians, and the same amount to be deducted from the sum stipulated to be paid to the Sacs and Foxes.

Article 3. The United States further agree to deliver to the confederated tribes of Sacs and Foxes two hundred horses, as near that number as can be procurred with the sum of nine thousand three hundred and forty-one dollars, to be delivered at the payment of the annuities in June one thousand eight hundred and thirty-seven.

Article 4. At the special request of the Sac and Fox Indians aforesaid, the United States agree to make the following provisions for the benefit and support of seven half-breeds of the Sac and Fox nation, to wit; The United States agree to pay to—Wayman for the use and benefit of his half-breed child by a Fox woman named Ni-an-no, one thousand dollars, to Wharton R. McPhearson for the use and benefit of his half-breed child by To-to-qua, a Fox woman, one thousand dollars, to James Thorn for the use and benefit of his half-breed child by Ka-kee-o-sa-qua, a Fox woman, one thousand dollars, to Joseph Smart for the use of his half-breed child by Ka-ti-qua a Fox woman one thousand dollars, to Nathan Smith for the use and benefit of his half-breed child by Wa-na-sa a Sac woman one thousand

dollars, and to Joseph M. Street Indian agent, two thousand dollars for the use and benefit of two half-breed children, one the child of Niwa-ka-kee a Fox woman, by one Mitchell, the other the child of Ni-an-na by Amos Farrar, the two thousand dollars to be put at interest, and so much of said interest arising therefrom to be expended for the benefit of the children as said agent shall deem proper and necessary, and when each shall arrive at the age of twenty years, the said agent shall pay to each half-breed one thousand dollars and any balance of interest remaining in his hands at the time.

ARTICLE 5. At the special request of the said confederated tribes of Sac and Fox Indians it is further agreed by the United States, to pay to Joseph M. Street their agent, two hundred dollars for the use and benefit of Thompson Connoly and James Connoly children of their friend John Connoly deceased, to be by said agent put at interest and expended on the education of said Thompson and James Connoly children of said John Connoly deceased.

ARTICLE 6. The said confederated tribes of Sac and Fox Indians hereby stipulate and agree to remove from off the lands herein in the first article of this treaty ceded to the United States, by the first day of November next ensuing the date hereof, and in order to prevent any future misunderstanding, it is expressly agreed and understood that no band or party of the said confederated tribes of Sac and Fox Indians, shall plant, fish or hunt on any portion of the country herein ceded after the period just mentioned.

ARTICLE 7. This treaty shall be obligatory on the contracting parties after it shall be ratified by the President and Senate of the United States.

Done at the treaty ground on the right bank of the Mis-

sissippe in Debuque country Wisconsin Territory opposite Rock island this twenty eighth day of September one thousand eight hundred and thirty-six.

A. Dodge.

A-sho-wa-huk,
Ma-sha-na,
Wa-ko-sha-she,
Sa-sa-pe-man,
Na-wo-huck,
Pen-na-see
Foxes:
Wa-pella,
Pow-a-sheek,
Qua-qua-na-pe-qua,
Wa-pak-onas-kuck,
Wa-tup-a-waut,
Ma-kee-won-a-see,
Ka-ka-no-an-na.
Sacs:
Kee-o-kuck,
Pashapahoo,
We-she-ko-ma-quit,
Ap-a-noose,
Pe-a-chin-wa,
Mo-wha-wi,
Wa-pe-sha-kon.

In presence of us—

James W. Grimes, secretary of commission.
Jos. M. Street, Indian agent.
L. Dorsey Stockton, jr., attorney at law.
Ant. Leclaire, interpreter.
Frans. Labussar, interpreter.
James Craig.
P. R. Chouteau, jr.
Geo. Davenport.
Nathl. Knapp.
W. R. McPherson.
Geo. W. Atchison.
Jeremiah Smith.
Nathan Smith.
Robt. Serrell Wood.
Geo. Catlin.
Richard J. Lockwood.
Enoch Gilbert.
Courtlandt Lawson.
George Miller, jr.
Courtlandt Lawson.

To the Indian names are subjoined a mark and seal.

TREATY WITH THE SAUK AND FOXES, 1837.

Articles of a treaty made at the city of Washington, between Carey A. Harris, Commissioner of Indian Affairs, thereto authorized by the President of the United States, and the confederated tribes of Sacs and Foxes, by their chiefs and delegates.

ARTICLE 1. The Sacs and Foxes make to the United States the following cessions:

First. Of a tract of country containing 1,250,000 (one million two hundred and fifty thousand) acres lying west and adjoining the tract conveyed by them to the United States in the treaty of September 21st, 1832. It is understood that the points of termination for the present cession shall be the northern and southern points of said tract as fixed by the survey made under the authority of the United States, and that a line shall be drawn between them, so as to intersect a line extended westwardly from the angle of said tract nearly opposite to Rock Island as laid down in the above survey, so far as may be necessary to include the number of acres hereby ceded, which last mentioned line it is estimated will be about twenty-five miles.

Second. Of all right or interest in the land ceded by said confederated tribes on the 15th of July 1830, which might be claimed by them, under the phraseology of the first article of said treaty.

ARTICLE 2d. In consideration of the cessions contained in the preceding article, the United States agree to the following stipulations on their part:

First. To cause the land ceded to be surveyed at the expense of the United States, and permanent and prominent land marks established, in the presence of a deputation of the chiefs of said confederated tribes.

Second. To pay the debts of the confederated tribes, which may be ascertained to be justly due, and which may be admitted by the Indians, to the amount of one hundred thousand dollars ($100,000) provided, that if all their just debts amount to more than this sum, then their creditors are to be paid *pro rata* upon their giving receipts in full; and if said debts fall short of said sum, then the remainder to be paid to the Indians. *And provided also,* That no claim for depredations shall be paid out of said sum.

Third. To deliver to them goods, suited to their wants, at cost, to the amount of twenty-eight thousand five hundred dollars ($28,500.)

Fourth. To expend, in the erection of two grist mills, and the support of two millers for five years, ten thousand dollars ($10,000.)

Fifth. To expend in breaking up and fencing in ground on the land retained by said confederated tribes, and for other beneficial objects, twenty-four thousand dollars ($24,000.)

Sixth. To expend in procuring the services of the necessary number of laborers, and for other objects connected with aiding them in agriculture, two thousand dollars ($2,000) a year, for five years.

Seventh. For the purchase of horses and presents, to be delivered to the chiefs and delegates on their arrival at St. Louis, four thousand five hundred dollars ($4,500,) one thousand dollars ($1,000) of which is in full satisfaction of any claim said tribe may have on account of the stipulation for blacksmiths in the treaty of 1832.

Eighth. To invest the sum of two hundred thousand dollars ($200,000) in safe State stocks, and to guarantee to the Indians, an annual income of not less than five per cent. the said interest to be paid to them each year, in the manner annuities are paid, at such time and place, and in money or goods as the tribe may direct. *Provided,* That it may be competent for the President to direct that a portion of the same may, with the consent of the Indians, be applied to education, or other purposes calculated to improve them.

ARTICLE 3d. The two blacksmith's establishments, and the gunsmith's establishment, to which the Sacs and Foxes are entitled under treaties prior to this, shall be removed to, and be supported in the country retained by them, and all other stipulations in former treaties, inconsistent with this, or with their residence, and the transaction of their business on their retained land are hereby declared void.

ARTICLE 4th. The Sacs and Foxes agree to remove from the tract ceded, with the exception of Keokuck's village, possession of which may be retained for two years, within eight months from the ratification of this treaty.

ARTICLE 5th. The expenses of this negotiation and of the chiefs and delegates signing this treaty to this city, and to their homes, to be paid by the United States.

ARTICLE 6th. This treaty to be binding upon the contracting parties when the same shall be ratified by the United States.

In witness whereof the said Carey A. Harris, and the undersigned chiefs and delegates of the said tribes, have hereunto set their hands at the city of Washington, this 21st October A. D. 1837.

C. A. Harris.

Sacs or Saukes:

Kee-o-kuck. The Watchful Fox, principal chief of the confederated tribes,
Wau-cai-chai. Crooked Sturgeon, a chief,
A-shee-an-kon, Sun Fish, a chief,
Pa-nau-se, Shedding Elk,
Wau-wau-to-sa, Great Walker,
Pa-sha-ka-se, The Deer,
Appan-oze-o-ke-mar, The Hereditary Chief, (or He who was a Chief when a Child,)
Waa-co-me, Clear Water, a chief,
Kar-ka-no-we-nar, The Long-horned Elk,
Nar-nar-he-keit, the Self-made Man,
As-ke-puck-a-wau, The Green Track,
Wa-pella, the Prince, a principal chief,
Qua-qua-naa-pe-pua, the Rolling Eyes, a chief,
Paa-ka-kar, the Striker,
Waa-pa-shar-kon, the White Skin,
Wa-pe-mauk, White Lyon,
Nar-nar-wau-ke-hait, the Repenter, (or the Sorrowful,)
Po-we-sheek, Shedding Bear, a (principal chief,)
Con-no-ma-co, Long Nose Fox, a chief, (wounded,)
Waa-co-shaa-shee, Red Nose Fox, a principal chief Fox tribe, (wounded,)
An-non-e-wit, The Brave Man,
Kau-kau-kee, The Crow,
Kish-kee-wosh, The Man with one leg off.

Signed in presence of—

Chauncey Bush, Secretary.
Joseph M. Street, U. S. Indian Agent.
Joshua Pilcher, Indian Agent.
Geo. Davenport.
J. F. A. Sanford.
S. C. Stambaugh.
P. G. Hambaugh.
Antoine Le Claire, U. S. Indian Interpreter.

(To the Indian names are subjoined marks.)

§ 70a. Jurisdiction; claims considered; offsets and counterclaims

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made

by the United States on the claim, and for all other offsets, counterclaims and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28: *Provided,* That expenditures for food, rations, or provisions shall not be deemed payments on the claim. The Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478 and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

As amended Oct. 27, 1974, Pub.L. 93-494, § 2, 88 Stat. 1499.

§ 70s. Review by Court of Claims and Supreme Court

(a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: *Provided,* That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28. Aug. 13, 1946, c. 959, § 20, 60 Stat. 1054; Sept. 8, 1960, Pub.L. 86-722, 74 Stat. 829.

Supreme Court, U. S.
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No. 75-475

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-475

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The questions presented in this case concern the valuation of three tracts of land in eastern Iowa, exclusive of other tribal claims, that were ceded to the United States by the Sac and Fox Tribe of Indians in 1833, 1837 and 1838. After a trial before the Indian Claims Commission, at which petitioners contended that the land was worth between $2.50 and $3.00 per acre and the government contended that the value was in the range of $0.43 to $0.80 per acre, the Commission concluded that the tract ceded in 1833 was worth $0.90 per acre, that the tract ceded in 1837 was worth $1.25 per acre, and that the tract ceded in 1838 was worth $1.10 per acre (Pet. App. 31, 37). These factual determinations, which were affirmed by the Court of Claims without dissent (Pet. App. 2), warrant no further review.

1. In the 1962 trial on the issue of land value, petitioners presented two expert witnesses who submitted a joint report and testified concerning their valuation of the three tracts and the method by which they had arrived at their conclusions. The experts relied essentially upon a so-called "bona fide market" approach, whereby the value of the land was determined not on the date of cession but rather as of the date when approximately 75 percent of the public lands in the area had passed into private ownership (Pet. App. 32). Since, as petitioners' experts conceded, a "bona fide market" did not exist for the eastern Iowa lands until many years after the cessions, the Commission rejected the petitioners' "novel" approach, stating (Pet. App. 32) that "it simply avoids the consequences of valuing the subject tracts as of the 1833-39 period."

In its findings of fact the Commission further explained its view of petitioners' "bona fide market" approach to valuation (Pet. App. 64-65):[1]

> Both [expert] witnesses, however, based their value conclusions on the existence of a "bona fide market" condition, a situation which both acknowledge did not exist as of the respective cession dates but theoretically was not reached in the cession areas until the early 1850's when approximately 75% of the available public land had passed into private hands. As a result both witnesses rely on the conditions affecting land values in eastern Iowa that existed from 15 to 20 years after the subject areas were ceded to the United States. * * *

[1]The Commission also noted that even if petitioners' data concerning private sales in the ceded area had been relied upon, they would not have supported petitioners' value conclusions (Pet. App. 35-36), and that petitioners' expert witnesses had failed to consider the difference between what a buyer would willingly pay for a 70-acre farm and for tracts of 217,600 acres, 1,189,000 acres, and 5,350,400 acres (Pet. App. 36).

> While the petitioners' experts did use private sales data in their computations, the Commission finds the "bona fide market" approach upon which their fair market value conclusions were based is unacceptable and not responsive to the economic, political and other conditions that would have influenced and controlled a land market in eastern Iowa as of the effective cession dates for the three subject tracts. * * * In the Commission's judgment the petitioners' experts ultimate conclusions on the value of the three subject tracts as of their respective cession dates are unrealistic and not supported by substantial evidence.

Having rejected the petitioners' approach, the Commission proceeded to value the land in question by weighing a number of physical, political, and economic factors (Pet. App. 33-35). Most important in this valuation was the abundance throughout the cession period of a vast amount of public land in neighboring areas that had been offered for sale at the uniform price of $1.25 per acre (Pet. App. 35).[2] For each of the three tracts, the base price of $1.25 was augmented or diminished by considerations that a prospective private purchaser of that tract or a portion thereof would have taken into account (Pet. App. 33-35).

Upon petitioners' appeal of the Commission's 1969 decision, the Court of Claims remanded the case to the Commission for "more specific findings and reasoning as to the valuations adopted" (Pet. App. 19-27). On remand, the petitioners—some 10 years after trial—suggested for the first time that the record was incomplete and attempted

[2]Petitioners' experts repeatedly acknowledged the depressing effect on land values in eastern Iowa of the enormous supply of available public land nearby (Pet. App. 32-33, n. 4).

to introduce evidence of sales outside eastern Iowa that were contemporaneous with the three cession dates. Two attempts by petitioners to submit such further evidence were denied. In its decision on remand, the Commission explained in detail the process by which it had arrived at its earlier conclusions of value (Pet. App. 3-18). On appeal for the second time, the Court of Claims affirmed (Pet. App. 2), and petitioners' motions for rehearing *en banc* were denied (Pet. App. 1).

2. The Court of Claims correctly affirmed the Commission's decision on remand. In the Commission's opinion (Pet. App. 8-12), it explained at great length, to the satisfaction of the Court of Claims, how it had determined the land values. These findings of fact on an exceedingly difficult issue not subject to mathematical exactness—the value more than a century ago of enormous tracts of undeveloped territory—were reached in a reasonable and logical manner and in full conformity with applicable legal principles, and there is thus no basis for disturbing the findings.

The Commission's decision is not in conflict with *Sinclair Refining Co.* v. *Jenkins Petroleum Co.*, 289 U.S. 689, where the absence of a provable market value at the time of a breach pertaining to a unique, patented item led the Court to permit discovery of hindsight evidence of value. In *Sinclair*, no credible evidence was in existence at the time of breach by which to assess the fair value of the patent. Here, on the other hand, the trier of fact had sufficient relevant, contemporaneous evidence, such as the sale price during the 1830's of adjoining public land, the location of the tracts, the quality of the soil, the degree of political organization in the area, and the climate, to support a determination of value. The Commission on remand was of

the view that the record as it existed was adequate and that a reopening of the trial was not necessary,[3] and that decision was not an abuse of discretion.

3. The Commission's ruling worked no change in the law so as to require receipt of new or additional evidence. Petitioners argue to the contrary (Pet. 23-25), relying on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97.

Chevron discusses the factors that the Court has considered in determining whether to apply a new principle of law to a litigant who has acted in reliance upon a prior doctrine. The 1969 ruling of the Commission, however, neither overruled past precedent on which petitioners had relied nor constituted a decision on an issue of first impression, the resolution of which had not been clearly foreshadowed. On the contrary, the Commission's decision in this case to adopt a method of valuation that was not based upon contemporaneous private sales data in other areas follows a precedent established in 1955 in *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265, certiorari denied, 350 U.S. 848.[4]

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[3]The Court of Claims' remand in 1971 was solely for the purpose of eliciting more specific findings on the evidence already received and did not mandate—nor did petitioners then seek—a reopening of the trial for reception of additional evidence or new theories of valuation. Indeed, the Commission on remand twice ruled that the record was sufficient for a determination of value, and its thorough analysis of the value question demonstrates the substantiality of the evidence.

[4]This approach was reiterated in *United States* v. *Emigrant New York Indians*, 177 Ct. Cl. 263, and is often referred to as the "Emigrant New York Indian" valuation method. Contrary to petitioners' assertion (Pet. 11, 13-14), the Commission did not acknowledge any inconsistency between its use of private sales data in valuing the central Iowa lands and the eastern Iowa lands. Rather, the Commission explained the consistency between its two decisions at length (Pet. App. 12-13).

In rejecting sales remote in time from the valuation date, the Commission acted in accordance with its 1959 decision in *Delaware Tribe of Indians* v. *United States,* 8 Ind. Cl. Comm. 150, 185-186. The *Delaware Tribe* decision establishes that the Commission will determine the probity of hindsight evidence based upon circumstances revealed by the record as a whole. Here, the Commission—which must be accorded wide discretion in weighing the evidence—concluded that the evidence of sales subsequent to the date of cession was unpersuasive because of the significant differences in demographic, political and economic conditions that had occurred during the intervening period. Thus, the Commission's decision did not depart from settled valuation precedents.

4. Petitioners made no attempt to introduce additional evidence until 1972, despite the fact that their so-called "new evidence" (sales outside the cession area at the date of taking) was as available for use in the 1962 trial as in 1972. Before neither the Commission nor the Court of Claims did petitioners assert a change in the law or raise a constitutional question as grounds for receipt of their additional evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

DOJ-1975-11

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-475

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITIONERS' REPLY BRIEF IN SUPPORT OF ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The respondent's memorandum in opposition ("Resp. Mem.") raises new arguments to which petitioners reply herein.

I. The Fair Market Value Established By Private Sales Considerations Stands Independently Of The Bona Fide Market Theory.

The respondent correctly admits that the Commission arrived at its valuation of petitioners' eastern Iowa lands by relying principally upon the vast abundance of public land available in neighboring areas at the uniform public

price of $1.25 per acre.[1] (Resp. Mem. 3) We agree that the Commission created a hypothetical prospective purchaser who took into account certain factors commencing with this base price (Resp. Mem. 3), but as proven by the Commission's ultimate valuations these factors resulted in deep discounts from the public price for the great preponderance of petitioners' land. Because the Commission's hypothetical purchaser lacks the simple ability to discern that the rich eastern Iowa farm lands far surpassed any on the market, he is permitted to buy the substantial majority of this land at the bargain price of 90¢ an acre while the real world private purchasers paid an average of $1.60 *more* per acre than the Commissioners' creation.[2]

[1] Such a valuation by the Commission clearly violates those previously undisturbed precedents of the Court of Claims that require probative weight to be accorded to private sales "not controlled by the Government's minimum statutory price for public lands . . . ." *Miami Tribe of Oklahoma, et al.* v. *United States,* 146 Ct. Cl. 421, 450-451, 175 F. Supp. 926, 943 (1959); *Osage Nation of Indians* v. *United States,* 119 Ct. Cl. 592, 97 F. Supp. 381, 420 (1951) cert. denied, 342 U.S. 896; *Alcea Band of Tillamooks, et al.* v. *United States,* 115 Ct. Cl. 463, 504, 87 F. Supp. 938, 947 (1950) reversed as to interest, 341 U.S. 48; *Rogue River Tribe of Indians, et al.* v. *United States,* 116 Ct. Cl. 454, 478, 89 F. Supp. 798, 803 (1950) cert denied, 341 U.S. 902; *Sac and Fox Tribe of Indians of Oklahoma* v. *United States,* 167 Ct. Cl. 710, 714-15, 340 F.2d 368, 370 (1964). The respondent's memorandum totally ignores these governing precedents.

[2] As is stated by the recognized authority Bonbright, *The Valuation of Property,* p. 61 (1st. Ed. 1937),

> "In short, we are convinced that the willing buyer-willing seller incantation is a great bar to clear thinking in the law, and that it has no more place in legal opinions than it has in the literature of economic theory. In the words of Judge Rose, 'The effort is to find out not what a real buyer and a real seller under the conditions actually surrounding them do, but what a purely imaginary buyer will pay a make-believe seller under conditions which do not exist. You are forced to wonder what would have happened if everything had been different from what it was. It is not easy to guess what will take place in Wonderland, as other people than Lewis Carroll's heroine have found out.'"

In an apparent attempt to justify this fundamental error, the respondent quotes (Resp. Mem. 2-3) language from the Commission's 1969 valuation decision which is critical of the bona fide market theory, *one* of several valuation methods employed by petitioners' experts. This valuation approach established that "normal" land market conditions prevailed in an area when approximately 75% of the land had passed from Government to private ownership. When that point was reached in eastern Iowa, the private sale considerations paid for unimproved lands stiffened slightly to more closely approximate their actual fair market value unaffected by the governmentally depressed sale price of surrounding public lands. The importance of this analysis was that *notwithstanding the depressing effect* of the irrelevant Government price of $1.25 per acre, from the very earliest private land sales and throughout the period 1839-49, there were thousands of private transactions involving over one million acres of unimproved eastern Iowa land which the Commission itself found brought an average price of $2.46 per acre. (App. 61) Having made this finding, the Commission proceeded to ignore this best evidence of value of the cession lands.[1]

The 75% analysis employed by petitioners' experts is consistent with established legal doctrines which reject utilization of forced-sale and depressed-market prices in determining property value. In Orgel, *Valuation Under Emi-*

[1] The Commission found that the $1.25 per acre price resulted from a political compromise between those members of Congress who wished to give away public land and those who wanted to sell them to raise revenue. The price was the same for the finest and worst of lands. (App. 57) The Commission adopted this clearly irrelevant standard as its valuation base and ignored the actual private sale considerations paid for the cession lands.

nent Domain, § 22, pp. 99-100 (2d Ed. 1953) the author states:

> "In eminent domain, no less than in other fields of valuation, the use of the 'willing buyer-willing seller' phraseology is clearly designed to guard against the acceptance of forced-sale values as representing 'fair' market values. The 'willing seller' is a person who is 'not compelled to sell.' The value is 'not such a value as might be obtained for the property at a forced sale.' Courts have even excluded testimony of forced-sale prices at which the given property or similar property, had been previously sold." (Citations omitted.)

Consistent with this Court's precedent in *Sinclair Refining,* petitioners' experts arrived at their valuations after making an exhaustive study of over 19,000 sale transactions between the earliest white settlers which proved the value *they* placed on petitioners' lands. It is this white man's value that petitioners are entitled to receive under the Act. The right to such fair market value is not in any way diminished by employment in part of a bona fide market analysis which, consistent with governing precedent, permits an appraiser 140 years after the event to look into established history to the point when a fair or normalized market shows a slight stiffening of land prices.

Indeed, the evidence in this case is so clear and uncontroversial, and is in such abundance and scope, as to amply support the values petitioners claim for the eastern Iowa lands without need for expert opinion or interpretation. As is shown in the following summary of resale prices from petitioners' comprehensive appraisal report (T-4, p. 112, Table 23), a consistent range of average resale prices persisted for unimproved cession lands from the very first private land sales throughout the period 1839-49:

	Year	No. Transactions	Acreage	Value Total	Value Per Acre
"Summary	1839-41	2,442	199,386	$465,643	$2.34
All Tracts	1842-44	2,955	231,220	573,892	2.48
	1845-47	4,352	270,467	725,455	2.60
	1848-49	3,911	249,373	594,388	2.38"

Under governing precedents, the Commission committed fundamental error in wholly rejecting these actual private sale prices paid by settlers for the cession lands, thereby denying petitioners a hearing with respect to this best evidence.

II. No Adequate Valuation Basis Existed At The Cession Dates To Justify A Departure From The Holding In *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co., 289 U.S. 689 (1933).*

The respondent purports to distinguish the facts of the *Sinclair Refining* case from the instant record on the basis that contemporaneous evidence before the Commission provided an adequate basis for a determination of fair market values of the cession lands without reference to petitioners' comprehensive private sales evidence. (Resp. Mem. 4) The respondent points to such non-market-price factors as "the sale price during the 1830's of adjoining *public* land, the location of the tracts, the quality of the soil, the degree of political organization in the area, and the climate . . . ." (Resp. Mem. 4) (Emphasis added.) In *Sinclair Refining* the Court could have equally limited its considerations to such conjectural elements of value known at the time of breach of a patent agreement, but the Court clearly held that a wrongdoer is not entitled to the benefit of such "uncertain prophecies" when years have gone by to "expose to light the elements of value that were there from the beginning." *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. at

689. As one of petitioners' valuation experts[1] aptly testified at trial in accord with *Sinclair Refining*, eastern Iowa should not be valued by closing one's eyes to historical fact:

> "[W]e are living more than a century after these events transpired. Without holding our heads in the sand, we can't close our eyes to what has happened since then. In an appraisal of this type, or an evaluation of this type, it seems to me that we have a unique opportunity to find out what the value actually was. *There is an adage that appraisers use that the value of a thing is the price it will bring, and if you operate after the time period you should change this, the value of a thing is the price it did bring.*" (Tr. 1298) (Emphasis added.)

The argument made by respondent begs the principal issue already decided by *Sinclair Refining* and again placed before the Court in the context of this case arising under the highly remedial Indian Claims Commission Act. *Sinclair Refining* holds that historical evidence may not be ignored by a fact-finding body where such proof provides the best evidence of value of unique property. The unique richness of petitioners' eastern Iowa lands caused them to sell at an unprecedented rate and at private sale prices of twice the Government price. Clearly, the Congressional intent of the Act to fairly and finally resolve outstanding Indian claims cannot be satisfied, and petitioners' lands cannot be properly valued, unless the post-cession sales evidence in this case is accorded substantial probative weight as the best evidence of value in accord with the rule in *Sinclair Refining* and related precedents.

III. Prior Governing Precedents Do Not Support The Commission's Rejection Of Petitioners' Post-Cession Sales Evidence.

As is stated in the Petition for a Writ of Certiorari, the Commission's decision below denying probative weight to

[1] The expert referred to is Dr. Raleigh Barlowe, Professor and Head of the Department of Resource Development at Michigan State University. (Tr. 1094)

comprehensive post-cession sales evidence cannot be supported by this Court's precedents, general valuation precedents or apposite precedents in Indian cases. The respondent alleges (Resp. Mem. 5-6) that the rejection of such evidence is supported by the decisions in *Otoe and Missouria Tribe of Indians* v. *United States,* 131 Ct. Cl. 593, 131 F. Supp. 265 (1955), cert. denied, 350 U.S. 848, reversing 2 Ind. Cl. Comm. 335; *United States* v. *Emigrant New York Indians,* 177 Ct. Cl. 263 (1966); and *Delaware Tribe of Indians* v. *United States,* 8 Ind. Cl. Comm. 150 (1959). However, these cases are obviously inapplicable to the case at bar and in no way detract from the line of unbroken apposite precedents relied upon by petitioners. (p. 2, fn.1 *supra*)

The *Otoe* and *Emigrant New York Indians* cases are not authority for rejecting the petitioners' private post-cession sales evidence because those cases did not involve any evidence whatsoever of private sale considerations within cession lands shortly after cession. Those cases related to methods of valuation to be employed in the absence of such comparable private sales evidence.

Similarly, the respondent's reliance upon the Commission's decision in *Delaware Tribe* v. *United States,* 8 Ind. Cl. Comm. 150 (1959) is misplaced. At issue in *Delaware* was the valuation of a ten mile wide strip of land extending for 150 miles across northeastern Kansas known as the "Delaware Outlet" which was ceded by the petitioners in 1854. The petitioners placed in evidence sales made in certain comparison tracts. (8 Ind. Cl. Comm. at 180) However, the sales in the alleged comparison areas were not relevant because the comparison areas were "vastly different than the elongated 10 mile wide Outlet strip reaching out into country frequented by hostile Indian tribes." (8 Ind. Cl. Comm. at 186) The Commission accordingly held that the land boom occurring in the comparison areas some

two years after the cession of the Outlet could not reasonably be used as a factor to assess the worth of the Outlet land.

As distinguished from the facts in *Delaware,* the case at bar involves an unprecedented rapid rate of land sales *within* the ceded Iowa tracts after they were first opened to public settlement. (T-4, p. 81) Consequently, the *Delaware* case is irrelevant to this case. This land rush into eastern Iowa would have been forecast by any competent observer who considered the readily apparent enormous fertility of the eastern Iowa land as compared to any other lands in the United States.

The cases cited by the respondent do not establish any rule under the Act which rejects post-cession private sales evidence such as that relied upon by petitioners in the 1962 trial of this cause. The Commission may not by fiat create a new rule of law contrary to well-established doctrines enunciated by higher federal tribunals. In light of the precedents of *Sinclair Refining* and the uninterrupted line of *relevant* cases decided by the Court of Claims under the Act requiring that probative weight be given to post-cession private sales (p. 2, fn. 1 *supra*), the Commission committed clearly reversible error in rejecting petitioners' in-depth private sales data. Contrary to the respondent's assertion (Resp. Mem. 5), the decisions appealed from clearly attempt to overrule past precedent on which petitioners' justifiably relied in formulating the basic theory of their case at trial. If this clear departure from past precedent is to be allowed, then petitioners did not wait too long under the Court's *Huson* decision to seek the opportunity to meet this new standard when this case was remanded to the Commission following appeal of the Commission's 1969 valuation decision.

CONCLUSION

For the reasons stated herein and in petitioners' petition for issuance of a writ of certiorari, petitioners respectfully pray that a writ of certiorari issue to review the decisions below.

Respectfully submitted,

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